

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of:

Bayer Crop Science LP and
Nichino America, Inc.

Petitioners.

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FIFRA-HQ-2016-0001

**RESPONDENT'S OPPOSITION TO BAYER CROPSCIENCE LP AND NICHINO
AMERICA, INC.'S MOTION FOR AN ACCELERATED DECISION**

process is consistent with the plain language Congress set forth in FIFRA section 6(e) to distinguish it from FIFRA section 6(b) hearings as well as the legislative history that states, “[u]nder the new provision [6(e)], the Administrator is required to issue a notice of intent to cancel a ‘conditional’ registration issued under section 3 of FIFRA if (1) during the period provided for the satisfaction of the condition, the Administrator determined that the registrant has failed to initiate and pursue appropriate action to satisfy any imposed condition, or (2) at the end of the period provided for satisfaction of the any condition, the condition has not been satisfied.” S. Rep. 95th Congress 2d Session Committee on Agriculture, Nutrition, and Forestry (January 1979).

Although once EPA determines a condition has not been met it has an obligation to issue a notice of intent to cancel under FIFRA section 6(e), EPA may use discretionary authority to first resolve its concerns through other methods such as cancellation under 6(b). FIFRA provides a variety of grounds for cancelling a pesticide product, and gives EPA the discretion to choose which to exercise when there appear to be alternative grounds for cancellation. FIFRA expressly provides eight discrete and distinct authorities for cancelling pesticides:

- FIFRA section 3(c)(1)(F)(iii) requires EPA to cancel without further hearing the registration of a pesticide on account of the registrant’s failure to participate in a certain procedures, agreements or arbitration decisions concerning data rights compensation.
- FIFRA section 4(d)(5) authorizes EPA to cancel the registration of a pesticide “by order and without a hearing” on account of the registrant’s failure to file certain notices associated with seeking reregistration.

- FIFRA section 4(e)(3)(A) requires EPA to cancel the registration of a pesticide, by order and without hearing, on account of the registrant's failure to submit certain data in support of reregistration.
- FIFRA section 4(e)(3)(B)(iii) authorizes EPA to cancel the registration of a pesticide on account of inadequacies in responses to certain reregistration requirements. "If a hearing is requested, a hearing shall be conducted under section 6(d), except that the only matter for resolution at the hearing shall be whether the registrant made a good faith attempt to conform its submission to such guidelines. The hearing shall be held and a determination made within 75 days after receipt of a request for hearing." *Id.*
- FIFRA section 4(i)(1)(H) authorizes EPA to cancel the registration of a pesticide, by order and without hearing, on account of the registrant's failure to pay required maintenance fees.
- FIFRA section 6(b) authorizes EPA to cancel the registration of a pesticide because the pesticide does not comply with FIFRA, or when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment.
- FIFRA section 6(e) requires EPA to cancel a section 3(c)(7) conditional registration of a pesticide on account of the registrant's failure to initiate and pursue appropriate action toward fulfilling a condition or failure to satisfy any condition. "If a hearing is requested, a hearing shall be conducted under subsection (d) of this section. The only matters for resolution at that hearing shall be whether the registrant has initiated and pursued appropriate action to comply with the condition or conditions within the time provided or whether the condition or conditions have been satisfied within the time provided, and

whether the Administrator's determination with respect to the disposition of existing stocks is consistent with this Act. ... Notwithstanding any other provision of this section, a hearing shall be held and a determination made within seventy-five days after receipt of a request for such hearing." *Id.*

- FIFRA section 6(f) authorizes EPA to cancel upon the registrant's voluntary request.

It is possible that several of these provisions could simultaneously pertain to a single pesticide product. For example, a pesticide conditionally registered pursuant to FIFRA section 3(c)(7) with a condition requiring submission of a two-generation reproductive health study by a date certain, could be subject to cancellation per FIFRA section 6(e) for failing to meet that deadline, while also being subject to cancellation per FIFRA section 4(i)(1)(H) for failure to pay maintenance fees. In such cases, it would be unreasonable to read FIFRA as requiring EPA to commence three separate cancellation actions. **As FIFRA specifies no hierarchy regarding its various cancellation authorities, it is reasonable to read FIFRA as allowing EPA the discretion to choose which cancellation authority to utilize in any particular case.**

Although FIFRA specifies no hierarchy among its various cancellation authorities, certain differences in the language used might arguably suggest the use of one authority rather than another, as some of these provisions are expressed in language that may be read as mandatory²³ while others are phrased in language that implies a measure of agency discretion.²⁴

²³ FIFRA section 3(c)(1)(F)(iii) ("the Administrator shall deny the application or cancel the registration..."), FIFRA section 4(d)(5) ("the Administrator shall issue a notice of intent to cancel..."), FIFRA section 4(e)(3)(A) ("the Administrator, by order and without hearing, shall cancel..."), FIFRA section 6(e) ("The Administrator shall issue a notice of intent to cancel...").

²⁴ FIFRA section 4(e)(3)(B)(iii) ("the Administrator may issue a notice of intent to cancel..."), FIFRA section 4(i)(1)(H) ("the Administrator, by order and without hearing, may cancel..."), FIFRA section 6(b) ("the Administrator may issue a notice of the Administrator's intent ... to cancel...").