



ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re AMVAC Chemical Corporation;
Grower-Shipper Association of Central
California; J&D Produce; Ratto Bros., Inc.;
and Huntington Farms
Docket No. FIFRA-HQ-2022-0002
FIFRA Appeal No. 23-(01)M

ORDER DENYING RENEWED JOINT MOTION
FOR ENTRY OF FINAL DECISION

On June 16, 2023, Petitioners AMVAC Chemical Corporation (“AMVAC”), the Grower-Shipper Association of Central California, J&D Produce, Ratto Bros., Inc., and Huntington Farms, and Respondent U.S. EPA Office of Chemical Safety and Pollution Prevention, Office of Pesticide Programs (“OPP”) filed a Joint Motion for Entry of Final Decision (“Joint Motion”) incorporating the terms of a Settlement Agreement between AMVAC and OPP. The Settlement Agreement provides that the Environmental Appeals Board (“Board”) will retain jurisdiction to enforce and adjudicate disputes concerning the settlement. The Board denied the Joint Motion without prejudice because, among other things, the Joint Motion did not “provide an explanation of the legal basis for the Board to issue the proposed Final Decision and Order and retain jurisdiction to enforce and adjudicate disputes concerning the settlement.” Order Denying Joint Motion for Entry of Final Decision Without Prejudice 2 (June 22, 2023). The Board authorized the parties to file a new motion addressing five questions posed in the Board’s Order. See id. at 2-3. On June 27, 2023, the parties filed a Renewed Joint Motion for Entry of Final Decision (“Renewed Joint Motion”), responding to the Board’s questions and requesting that the Board

“enter a Final Decision and Order suspending AMVAC’s [dimethyl tetrachloroterephthalate (“DCPA”)] Technical Registration subject to the terms of the Settlement Agreement and retain jurisdiction to alter its Final Order and reinstate the suspended registration * * *.” Renewed Joint Motion at 15.

The Board encourages settlement of matters before it and appreciates the efforts of the parties to resolve this matter and respond to the Board’s questions. However, the relief requested by the parties in the Renewed Joint Motion is broader than the scope of the issues adjudicated by the Administrative Law Judge (“ALJ”) following Petitioners’ objections to the notice of intent to suspend (“NOITS”) the registration of DCPA. Significantly, the parties request that the Board undertake resolution of new disputes that have not yet arisen but which the parties suggest may arise under the Settlement Agreement in the future. The responses provided by the parties do not adequately address this fundamental issue.

In a proceeding to suspend a pesticide registration pursuant to FIFRA section 3(c)(2)(B)(iv), the “only matters” for resolution at a hearing are whether the registrant failed to take the action that served as the basis for the NOITS and whether the determination regarding the disposition of existing stocks is consistent with FIFRA. 7 U.S.C. § 136a(c)(2)(B)(iv). The Board previously determined that the “action that served as the basis” for the NOITS was AMVAC’s alleged failure to take appropriate steps to secure the data required by the Data Call-In (“DCI”). *In re AMVAC Chemical Corp.*, 18 E.A.D. 769, 781 (EAB 2022). Following an initial decision by an ALJ, the Board may enter a final order “accept[ing] or reject[ing] all or part of the initial * * * decision.” 40 C.F.R. § 164.103. Thus, the Board’s role in this matter, should exceptions be filed, is to review any challenges to the ALJ’s findings and conclusions as to whether AMVAC failed to take appropriate steps and whether the existing stocks provision is

consistent with FIFRA. If the Board agrees with the ALJ’s findings and conclusions, it will issue a suspension order. Alternatively, the Board may reject or modify the findings “even if acceptable to the parties.” *See id.*

In requesting that the Board retain jurisdiction to “reinstate the suspended registration” in the event of a dispute, Renewed Joint Motion at 15, the parties seek to have the Board adjudicate different questions than the ones at issue in the suspension proceeding—questions about whether the grounds for reinstatement have been met, not about whether the grounds for suspension have been met. Notably, the ALJ’s decision does not address questions about reinstatement.¹

The Settlement Agreement provides for reinstatement of the registration of DCPA within five days after the last outstanding report “has been determined (or deemed) to be in substantial accordance with applicable requirements” of the DCI. Settlement Agreement at 4. The parties state that AMVAC would seek a Board order reinstating registration in two possible scenarios: (1) AMVAC submits the required reports and they are declared or deemed in substantial accordance but OPP fails to reinstate, or (2) AMVAC submits the required reports and OPP declares them not in substantial accordance but AMVAC disagrees. Renewed Joint Motion at 8-9. In either scenario, the Board would have to determine whether reports submitted after the suspension order were substantially in accordance with the requirements of the DCI. This would require the Board to evaluate a new set of facts and address new issues that have not been previously adjudicated by an ALJ and were not at issue in the proceeding below.² As the Board

¹ The Notice of Intent to Suspend states that the suspension “will be rescinded when the Agency determines [AMVAC has] complied fully with the requirements which were the bases of this Notice.” Letter from Mary Elissa Reaves, Ph.D., Dir., Pesticide Re-evaluation Div., Office of Pesticide Programs, to Jon C. Wood, AMVAC 4 (Apr. 21, 2022). It does not specify any procedures for the rescission.

² This is a much different scenario than *In re Oakite Products, Inc.*, FIFRA Data Docket No. 208, 1995 WL 129864 (ALJ Jan. 4, 1995). There, the registrant had requested a hearing on a NOITS a

held in rejecting a request for continuing jurisdiction in *Arizona Municipal*, “[a]ny potential disputes arising in the course of implementing the Consent Agreement will almost certainly involve new or significantly different issues from those raised in the present petition, and thus the review of the existing petition is obviously not an appropriate vehicle for addressing those issues.” *In re Ariz. Mun. Storm Water NPDES Permits*, NPDES Appeal No. 98-5, at 6 (EAB Dec. 22, 1998) (Order Dismissing Petition for Review).

The Board acknowledges, as the parties maintain, that Part 164 does not expressly provide a specific procedure for reinstatement of a registration suspended under FIFRA section 3(c)(2)(B)(iv).³ Renewed Joint Motion at 14. But the parties’ effort to fill gaps between the statute and existing regulations through the terms of this settlement is not appropriate. Renewed Joint Motion at 14-15. The statute requires the Administrator to determine whether the registrant has met the standard for reinstatement. 7 U.S.C. § 136a(c)(2)(B)(iv). The Administrator’s authority to perform the Agency’s functions related to “administrative review, suspension, and cancellation of registration” under FIFRA are delegated to the Assistant Administrators for Chemical Safety and Pollution Prevention (“OCSPP”) and Enforcement and Compliance Assurance in the first instance, while the authority to “make final decisions following hearings” is delegated to the Board. EPA Delegation of Authority 5-7 (May 11, 1994); *see also* Delegation

pesticide under FIFRA section 3(c)(2)(B)(iv). *Id.* at *1. Prior to a hearing, the parties entered into a settlement agreement in which the registrant agreed to submit data by certain dates. *Id.* at *2. The ALJ entered an order incorporating the terms of the settlement agreement, which provided that the Agency would request an immediate suspension order if the registrant failed to timely submit data. *Id.* at *3. Thus, the ultimate action by the ALJ would have been issuing an order of suspension based on the original notice, not adjudicating new issues arising after a suspension, nor issuing an order reinstating registration.

³ This is likely because the existing Part 164 regulations predate the enactment of FIFRA section 3(c)(2)(B). Federal Insecticide, Fungicide, and Rodenticide Act, sec. 2, § 3(c)(2)(B), 92 Stat. 819, 822-24 (1978); Rules of Practice Governing Hearings, Under the Federal Insecticide, Fungicide, and Rodenticide Act, 38 Fed. Reg. 19,371 (July 20, 1973).

of Authority 1-38A (delegating to the Board the authority to “perform administrative appeal functions”). OCSPP, or a division thereof if OCSPP’s authority is further delegated, is the appropriate entity to make the initial decision to reinstate a registration. *See* EPA Delegation of Authority 5-7. Indeed, the Settlement Agreement itself indicates that OPP will initiate the reinstatement absent a dispute. Settlement Agreement at 4. If or when a dispute arises, however, the Settlement Agreement effectively seeks to create a new procedure whereby the reinstatement is treated as a continuation of the original NOITS proceeding, Renewed Motion at 14, and in this context assigns the Board the authority to decide whether to reinstate a registration.

Furthermore, the role the parties ask the Board to undertake raises questions about transparency and potentially third-party rights. 40 C.F.R. Part 164 requires public notice of the intent to suspend a registration and provides adversely affected parties an opportunity to raise objections. 40 C.F.R. §§ 164.8, .20. Subpart B of Part 164, however, is silent as to any procedures for reinstatement. In contrast, Subpart D of Part 164 requires EPA to publish a notice in the Federal Register and hold a public hearing before allowing use of a pesticide for which registration has been suspended or cancelled. *Id.* §§ 164.130-.132. Given the extensive opportunities for notice and hearings before suspension or cancellation, “EPA has determined” that such orders should not be modified without affording similar processes. *Id.* § 164.130. The parties assert, without citation, that Subpart D is not applicable to the type of suspension at issue here. Renewed Joint Motion at 14 n.10. The parties stipulate in the Settlement Agreement that public notice will be provided after the reinstatement takes effect. Settlement Agreement at 4. But they do not address whether any advance public-notice procedures, such as those provided in

the Subpart B regulations for a NOITS, attach to the reinstatement process.⁴ This proceeding before the Board is not the appropriate forum to resolve these issues.

The Board is prepared to enter an order of suspension stipulated to by the parties. But, as explained above, the Board is not prepared to retain jurisdiction to resolve disputes that are more appropriately resolved by the parties or through a separate mediation or process. *See, e.g., In re TForce Freight, Inc.*, EPA Docket No. RCRA-06-2022-0943, at 18-19 (Nov. 8, 2022) (Consent Agreement and Final Order). For the reasons set forth above, the Board denies the Renewed Joint Motion.

The parties' first alternative request for relief is that the Board grant leave to amend the Settlement Agreement to be overseen and enforced by the ALJ. As stated above, OPP is the appropriate entity to initiate a reinstatement. The Board will not direct the ALJ to oversee a settlement agreement and resolve new disputes not addressed in the ALJ's initial decision in this matter. Accordingly, the Board denies the first alternative request for relief.

The parties' second alternative request is that the Board extend the time for filing exceptions and other briefs. In connection with this request, the parties stipulate to extend the deadline for the Board to issue a final decision by the number of days between the current deadline for exceptions and the extended deadline for exceptions. In consideration of the time required to file the Renewed Joint Motion, the parties' request for an extension, and the stipulation to an extension of the Board's deadline by the same number of days, the Board finds that cause exists to extend the deadline for filing of exceptions and appeal briefs in accordance with 40 C.F.R. § 164.6(b). Accordingly, the Board hereby:

1. **DENIES** the Renewed Joint Motion;

⁴ EPA could issue regulations establishing procedures for reinstatement following a suspension pursuant to FIFRA section 3(c)(2)(B)(iv), 7 U.S.C. 136a(c)(2)(B)(iv).

2. **ORDERS** that any exceptions to the Initial Decision and Order and appeal briefs on such exceptions be filed with the Board no later than **July 27, 2023**,⁵ and
3. **ORDERS** that any responses to the exceptions and appeal briefs be filed no later than **August 3, 2023**.⁶

So ordered.⁷

ENVIRONMENTAL APPEALS BOARD

Dated: July 7, 2023

By: 

Kathie A. Stein
Environmental Appeals Judge

⁵ This order further extends the deadline for filing exceptions beyond the time (thirty days from the filing of the initial decision) within which the hearing clerk is required to notify the Administrator if no exceptions are filed. 40 C.F.R. § 164.101(b). Ordinarily, such notification would take place ten days after the deadline for exceptions and the Board would have an additional ten days to “issue an order either declining review of the initial decision or expressing its intent to review said initial decision.” *Id.* In order to preserve that interval for this case, the Board will defer any consideration of *sua sponte* review until after the revised deadline for filing exceptions and appeal briefs expires on July 27, 2023, and, if no exceptions are filed, the Board shall have until August 16, 2023 to issue an order either expressing an intent to review or declining review of the initial decision. See *In re San Pedro Forklift*, CWA Appeal No. 12-02, at 1-2 n.1 (EAB Apr. 12, 2012) (Order Granting Second Motion for Extension of Time to File Appeal).

⁶ The Board does not express any view as to the substantive merits of the ALJ’s decision or to any forthcoming exceptions to the Initial Decision and Order.

⁷ The three-member panel deciding this matter is composed of Environmental Appeals Judges Aaron P. Avila, Mary Kay Lynch, and Kathie A. Stein.

CERTIFICATE OF SERVICE

I certify that copies of the foregoing Order Denying Renewed Joint Motion for Entry of Final Decision in the matter of AMVAC Chemical Corporation; Grower-Shipper Association of Central California; J&D Produce; Ratto Bros., Inc.; and Huntington Farms, FIFRA Appeal No. 23-(01)M, were sent to the following persons by electronic mail:

For Petitioner AMVAC Chemical Corporation

Hume M. Ross
Tracy A. Heinzman
Keith A. Matthews
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
Email: hross@wiley.law
Email: theinzman@wiley.law
Email: kmatthews@wiley.law

For Respondent Office of Pesticide Programs

Erin S. Koch
Forrest Pittman
Pesticides and Toxic Substances Law Office
Office of General Counsel
U.S. Environmental Protection Agency
Mail Code 2310A
1200 Pennsylvania Avenue NW
Washington, DC 20460
Email: koch.erin@epa.gov
Email: pittman.forrest@epa.gov

For Petitioners Grower-Shipper Association of Central California; J&D Produce; Ratto Bros., Inc.; and Huntington Farms

Cristen S. Rose
HAYNES BOONE
800 17th Street NW
Washington, DC 20006
Email: cristen.rose@haynesboone.com

Dated: Jul 07, 2023

Emilio Cortes

Emilio Cortes
Clerk of the Board