

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

In re:)
)
)
FIFRA Section 3(c)(2)(B) Notice of Intent)
to Suspend Dimethyl)
Tetrachloroterephthalate (DCPA))
Technical Registration)
)
AMVAC Chemical Corporation; Grower-)
Shipper Association of Central California;)
J&D Produce; Ratto Bros., Inc.; and)
Huntington Farms,)
)
Petitioners-Appellants)
)
Dkt No. FIFRA-HQ-2022-0002)

**REPLY TO OPPOSITION
TO MOTION FOR LEAVE**

AMVAC asks the EAB to consider this filing, which is made for the sole purpose of responding to the assertion in OPP's August 3, 2022, Opposition that 7 U.S.C. § 136a(c)(2)(B)(iv) requires the EAB to reach a "determination on this matter" by August 10, 2022.¹ That deadline does not apply.²

The referenced provision specifies a seventy-five day period for a final decision after *completion of a hearing* concerning a notice of intent to suspend. It states in pertinent part:

If a hearing is held, a decision after completion of such hearing shall be final. Notwithstanding any other provision of [FIFRA], a hearing shall be held and a determination made within seventy-five days after receipt of a request for such hearing.

In this case, a "determination" was already made within the seventy-five days when the ALJ issued the Order, granting OPP's Motion for Accelerated Decision ("MAD") on July 1, 2022 and cancelling the scheduled hearing. As no hearing was held, there is no statutory requirement that the EAB issue a *final* determination within any time frame supplied by the statute.

The EAB's only deadline for issuing a final determination following an accelerated decision is supplied by the regulations that the parties agreed applied to this proceeding, 40 C.F.R. Part 164, Subpart B. *See* OPP's MAD at 7. OPP agrees that the appeal-related provisions of that Subpart, including 40 C.F.R. § 164.102(c) as cited in its Opposition, have force in this proceeding, but would have the EAB ignore the following section, 164.103, which provides that the EAB shall have 90 days from the filing of an accelerated decision to issue its decision. This regulation, including the 90-day timeframe for the EAB to resolve appeals, was referenced at the conclusion of the ALJ's Order granting the MAD. Order at 35.

¹ The Grower Petitioners do not object to this filing; OPP does.

² Even if it did, timing alone would not be a reason to disregard AMVAC's Reply Brief, which is short and assists the EAB in clarifying the issues before it.

The EAB should follow the applicable regulations, consider the Reply Brief (and hold oral argument, if it deems appropriate) and issue a final determination within 90 days of the filing of the accelerated decision, 40 C.F.R. § 164.103, remanding for a further hearing to the extent it finds that genuine issues of material fact remain as to any data requirement.

In the alternative, if the EAB concludes that a final determination is required within seventy-five days even in cases in which an OPP accelerated motion is granted and no hearing held, the EAB should hold that the running of the 75-day deadline is tolled as of the date that an ALJ takes a hearing off the calendar in response to an accelerated motion until the date that the matter is remanded for a hearing by the EAB. Doing so is necessary to protect registrants' right to a hearing (and a fully considered appeal) in the event a hearing is delayed as a result of an accelerated motion.

Date: August 4, 2022

Respectfully Submitted,

/s/ Hume M. Ross
David B. Weinberg
Tracy A. Heinzman
Keith A. Matthews
Hume M. Ross
WILEY REIN LLP
2050 M ST NW
Washington, DC 20036
Telephone: (202) 719-7000
dweinberg@wiley.law
theinzman@wiley.law
kmatthews@wiley.law
hross@wiley.law

Counsel for AMVAC Chemical Corp.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Reply to Opposition to Motion for Leave**, was sent on August 4, 2022, to the following parties in the manner indicated below.

/s/ Hume M. Ross
Hume M. Ross

Copy by EAB E-Filing System to:

U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, D.C. 20460-0001

Copies by Electronic Mail to:

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: pittman.forrest@epa.gov

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

Counsel for Grower Petitioners

Counsel for Respondent-Appellee

Emilio Cortes
Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
1200 Pennsylvania Avenue, NW
Mail Code 1103M
Washington, D.C. 20460-0001
Email: Clerk_EAB@epa.gov

Dated August 4, 2022