

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

**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.)

Docket No. FIFRA-HQ-2022-0002

**PETITIONER AMVAC CHEMICAL CORPORATION'S
MOTION FOR ADDITIONAL DISCOVERY**

TABLE OF CONTENTS

| | Page |
|---|------|
| I. INTRODUCTION | 1 |
| II. PROCEDURAL HISTORY | 2 |
| III. ARGUMENT | 3 |
| A. Legal Standard..... | 4 |
| 1. Significant Probative Value..... | 5 |
| 2. Information Not Otherwise Obtainable/Cannot be Obtained by Alternative Methods | 6 |
| 3. Unreasonable Delay..... | 7 |
| 4. Reason to Believe that Evidence May Otherwise Not be Preserved for Hearing | 8 |
| B. AMVAC’s Request Topics and Categories for Written Discovery Satisfy the Standard | 8 |
| 1. Typicality..... | 9 |
| 2. Course of Performance/Extensions/Waivers | 10 |
| 3. OPP Contentions Regarding Specific AMVAC Actions | 10 |
| 4. Time Frames in the DCI | 11 |
| 5. Ability to Proceed with Risk Assessment..... | 12 |
| 6. Communications between PRD Team Leader and CRMs; PRD Files..... | 12 |
| 7. Agency Operating Procedures/Policy Statements | 14 |
| 8. Non-Issuance/Receipt of Documents | 15 |
| 9. Requests Concerning Specific Data Requirements | 16 |
| C. OPP’s Limited Voluntary Compliance Does Not Negate Need for Other Requests | 17 |
| D. AMVAC’s Requests for Depositions Satisfy the Standard..... | 19 |
| 1. Fed. R. Civ. P. Rule 30(b)(6)..... | 20 |
| 2. Michael Goodis..... | 21 |
| 3. Mary Elissa Reaves | 22 |
| 4. Jill Bloom | 23 |
| 5. Danette Drew, Christina Wendel, Stephen Wentz | 24 |
| IV. CONCLUSION..... | 25 |

I. INTRODUCTION

AMVAC Chemical Corporation (“AMVAC”) hereby moves the Presiding Officer, pursuant to 40 C.F.R. §§ 164.60 and 164.51, to enter an order requiring the Office of Pesticide Programs (“OPP”) to respond to the discovery requests filed with this Motion as **Attachments A & B** and to make several OPP personnel available for depositions on the topics specified in this motion.

The discovery sought meets the criteria in 40 C.F.R. § 164.51. Granting it will also greatly facilitate the efficient resolution of this complex and novel matter. The Environmental Appeals Board (“EAB”) has confirmed that the Presiding Officer must evaluate all actions taken by AMVAC to comply with each data requirement from OPP’s Data Call-In (“DCI”) that OPP asserts is a basis for the NOITS and determine whether those actions constituted “appropriate steps.” And the Presiding Officer must resolve this issue as to each requirement without any deference to OPP. *In re AMVAC Chemical Corporation*, 18 E.A.D. 769, 792-93 (EAB 2022) (the “Remand Order”). There are a large number of relevant underlying facts based on the EAB’s rulings concerning, inter alia, the relevance of the “typicality” of AMVAC’s conduct and the “course of performance” of the parties. *Id.* at 790.

This matter is unlike run-of-the-mill enforcement cases which only require the Presiding Officer to determine if a penalty policy was rationally applied to a more discrete set of facts. Rather than merely the quantum of a monetary penalty, the ability of an entire industry to use a key crop protection tool is at stake. The Presiding Officer’s evaluation of the steps taken by AMVAC may have implications for non-party registrants as well.

The scheduled hearing in this matter should be reserved for only the contested issues that the parties wish to dispute following discovery. It should not (and practically, cannot) serve as a forum in which the parties first seek additional relevant facts and details about the factual bases

for each other's positions. The discovery sought will simplify and streamline the hearing and ensure a full and fair hearing on the relevant issues. For all these reasons, and for the specific reasons set forth below, the Presiding Officer should exercise her discretion in favor of granting the discovery requested by AMVAC.

II. PROCEDURAL HISTORY

On September 28, 2022, the Environmental Appeals Board issued the Remand Order requiring the Presiding Officer to hold a hearing to determine whether AMVAC failed to take appropriate steps to secure data required by OPP in connection with twenty data requirements.¹ On October 3, 2022, the Presiding Officer issued a Hearing and Scheduling Order, Dkt. 30 (the "Scheduling Order"). In the Scheduling Order, the Presiding Officer stated that the parties could "engage in further mutually agreed upon discovery utilizing the standard methods of discovery described in the Federal Rules of Civil Procedure" to help expedite the hearing and "simplify the contested issues." *Id.* at 2. The Scheduling Order required a motion for additional discovery if the parties could not agree on the scope of voluntary discovery. *Id.*

Four days later, prior to any conference regarding discovery, OPP moved that the schedule set forth in the Scheduling Order be shortened and requested that the Presiding Officer declare that no discovery could possibly satisfy the criteria set forth in 40 C.F.R. §164.51. Respondent's Mot. to Am. Hearing and Scheduling Order, Dkt. 31. On October 18, the Presiding Officer granted OPP's request to shorten the schedule and moved the beginning of the hearing from mid-February to January 24, 2022. Order on Respondent's Motion to Amend Hearing and Scheduling Order, Dkt. 33 (the "Discovery Order"). But the Presiding Officer

¹ OPP indicated in its status report filed on October 21, 2022, that it considers one of the twenty to be satisfied, that it will no longer pursue suspension based on another two, and that it is continuing to evaluate other data submitted by AMVAC in connection with others.

denied OPP's request for a "blanket prohibition" on discovery and "encouraged" the parties to engage in discovery "so as to expedite the hearing and simplify contested issues." *Id.* at 1-2. The Discovery Order further noted that "permitting the parties to pursue some discovery is in conformity with the statute and is in the interests of justice." *Id.* The Order issued a new deadline of October 25, 2022 for motions to seek discovery and a final deadline for discovery to be completed by December 2, 2022. *Id.* at 2.

On October 20, 2022, the parties conferred regarding the scope of discovery. OPP agreed to review draft requests from AMVAC to be provided the following day, and to indicate by October 24 whether it would comply with any of those requests. OPP indicated on October 24 that it would voluntarily respond to three interrogatories and three requests for document production. It also stated that it would respond to some requests for admission, but it did not specify how many or which ones. OPP stated that it would not voluntarily make any personnel available for a deposition. As set forth in more detail below, the written discovery requests that OPP indicated it would comply with voluntarily are narrow in scope. OPP is thus refusing to provide other relevant information that is exclusively within its control and which producing would not cause unreasonable delay. For the reasons set forth below, AMVAC asks the Presiding Officer to require OPP to answer the remaining requests and make several of its personnel available for depositions.

III. ARGUMENT

The discovery AMVAC seeks meets the criteria for "other discovery" set out in 40 C.F.R. § 164.51. The information sought is relevant, exclusively within the control of OPP, and will not take an unreasonable amount of time to produce. There is also ample reason that the Presiding Officer should exercise her broad discretion to permit the requested discovery in this

proceeding, because doing so will facilitate resolution of this complex matter for all the reasons described in the introduction.

Section II.A describes the standard applicable to granting “other discovery” applicable to the Presiding Officer’s analysis of whether to require responses to the proposed Requests for Admission (“RFA”) set forth in **Attachment A** and the Interrogatories (“INT”) and Document Requests (“RFP”) set forth in **Attachment B**, and whether to require depositions as set forth below. Next, to facilitate consideration of AMVAC’s motion, Section II.B. divides up AMVAC’s written document requests by topic and explains why each topic is relevant. Section II.C. discusses why OPP’s indication that it will voluntarily produce a limited amount of information and documents does not negate the need for the other requests, and in fact helps establish that complying with the other requests should not be an undue burden or unreasonably delay the proceeding. Finally, Section II.D. sets out the depositions AMVAC is seeking, the topics AMVAC proposes to cover in each, and an explanation of why those topics are relevant.

A. Legal Standard

40 C.F.R. § 164.51(a) provides that “other discovery,” “guided by the procedures set forth in the Federal Rules of Civil Procedure . . . and the precedents thereunder” shall be permitted if the Presiding Officer determines:²

- (1) that such discovery shall not in any way unreasonably delay the proceeding[;]
- (2) that the information to be obtained is not otherwise obtainable[;] and
- (3) that such information has significant probative value.

² Several documents in this proceeding have referred to “additional discovery” rather than “other discovery.” References to either “other discovery” or “additional discovery” herein are to discovery as provided for in 40 C.F.R. § 164.51 generally, and as specifically sought in this Motion.

The standard for permitting depositions is separately stated in 40 C.F.R. § 164.51(b).

The Presiding Officer must find “good cause” for permitting depositions and further find that:

- (1) the information sought cannot be obtained by alternative methods, or
- (2) there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

Id. (emphasis added). The legal standard set forth above (within 40 C.F.R. Part 164, applicable to administrative proceedings under FIFRA) is very similar to the standard established in 40 C.F.R. §§ 22.19(e)(1) and (3) which applies to other types of administrative proceedings. *Cf. In re Lake Cnty.*, Docket No. CAA-8-99-11, 2000 EPA ALJ LEXIS 62, at *10 n.3, Order Requiring Am. Answer to Reqs. for Admis. (EPA ALJ, Aug. 24, 2000) (observing that the text in Part 22 was borrowed from Part 164). In view of this, and the intent that both incorporate procedures and standards applicable under the Fed. R. Civ. P., relevant precedent under both Parts is discussed below.

1. *Significant Probative Value*

The logical starting point in analyzing a motion seeking discovery is whether the facts sought could affect the Presiding Officer’s assessment of a material factual dispute. The EAB has held that the phrase “probative value” in the regulations refers to the “tendency of a piece of information sought to prove *a fact* that is of consequence in the case.” *In re Chautauqua Hardware Corp.*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 619, Order on Interlocutory Review (EAB, June 24, 1991) (citing McCormick on Evidence §185, at 542 (3rd Ed. 1984)) (“evidence that affects the probability that a fact is as a party claims it to be has probative force”).³ It is not

³ OPP may note that in *Chautauqua*, certain discovery requests were denied because the Chief Judicial Officer (“CJO”) found that internal EPA documents did not tend to prove or disprove facts relevant to the claims and defenses (there, failure to file EPCRA reports). The CJO found that documents which might call into question the wisdom of EPA’s Penalty Policy did not have “significant probative value” under the standard. Here, AMVAC is seeking information

required that the party seeking discovery establish in advance that the requested documents will certainly be “of significant value, or even of any value” to that party once produced. *In re William A. Rowell*, Docket No. TSCA-03-2005-0110, Order Granting Respondent’s Mot. for Disc. at 3 (EPA ALJ, Sept. 19, 2005). Nor may the party resisting discovery prevail solely by arguing that the legal standard for the central issues in the case is more restrictive than the party seeking discovery asserts. *Id.* AMVAC’s requests meet this criterion, as discussed in more detail in Section II.B. and its subsections, organized by topic of request.

2. *Information Not Otherwise Obtainable/Cannot be Obtained by Alternative Methods*

Additional discovery is necessary when the claimant has no other means to obtain the information. 40 C.F.R. §164.51 (a)-(b). These two criteria (the first formulation applying to written discovery and the latter applying to depositions) are self-explanatory and easily met here. The information and documents sought are (to the extent they exist at all) in the sole possession of OPP. It is possible that some of the information sought via a written discovery method would be “obtainable” via a deposition, and vice versa, but, given the limited time available to conclude discovery, it is not possible to permit only a single form of discovery to proceed in the hope that it would supply information that would then limit the scope of the other form. Thus, unless OPP can conclusively show that requested information is otherwise obtainable to AMVAC, these criteria are met with regard to all requests.

regarding EPA’s factual basis for the NOITS, including its assessment that AMVAC’s conduct was in some way “abnormal,” which the EAB has confirmed is material. Remand Order, 18 E.A.D. at 790. The documents should be discoverable here, as set forth in more detail in Sections II.B.1 and II.B.7.

3. *Unreasonable Delay*

Permitting written discovery must not “unreasonably delay” the proceeding. 40 C.F.R. § 164.51(a). Finding no “unreasonably delay” is naturally a component of establishing “good cause” for permitting depositions as well. Mere assertions that compliance might be “arduous and time consuming” are not sufficient to defeat a motion for discovery that otherwise seeks relevant information. *In re E.I. Du Pont De Nemours & Co.*, Docket No. FIFRA-95-H-02, Order Granting Mot. for Disc. at 2 (EPA ALJ, July 3, 1997).

The facts here are unique insofar as OPP has already argued that the initial schedule established by the Presiding Officer was too long, and the Presiding Officer has already shortened the schedule in response to OPP’s arguments. OPP, having used the need to accelerate the hearing as a sword, should not now be permitted to use the accelerated schedule as a shield to protect material that it does not wish to produce from discovery (while producing other material that it does wish to produce). The few discovery requests OPP has agreed to voluntarily comply with (discussed in Section II.C.) suggest that this may be the case – OPP will willingly produce material it believes to be helpful to its case, while asserting that other clearly relevant material should not be disclosed due to alleged burden and/or delay. Thus, while there is no literal application of the “sword and shield” doctrine applied to selective production of privileged material here, *see Jolivet v. Compass Grp. USA, Inc.*, 340 F.R.D. 7, 24 (N.D. Tex. 2021), the same notion of preventing selective disclosure applies. Presiding officers have previously recognized that, when the Government seeks to expedite resolution of a matter, it has a commensurate obligation to expeditiously comply with discovery requests. *In re Dr. Robert Schattner & Sporidicin Int’l*, Docket No. FIFRA-92-H-02, Order Granting Mot. for Disc. at 12 (EPA ALJ, Sept. 17, 1992) (“if [EPA] is truly interested in an early resolution of this matter, it will make every effort to supply the documents sought”).

The Presiding Officer must carefully scrutinize any claim that OPP, an instrumentality of the “richest, most powerful, and best represented litigant to appear” in U.S. Courts, *United States v. Parker*, 762 F.3d 801, 809 (8th Cir. 2014), is incapable of complying with a discovery request in a timely fashion, or that doing so will unduly tax its resources.

4. *Reason to Believe that Evidence May Otherwise Not be Preserved for Hearing*

Depositions may be required solely on the basis of a finding that evidence may not be preserved for hearing, independent and regardless of whether the information can be obtained by other means. *In re Carbon Injection Systems LLC*, Docket No. RCRA-05-2011-0009, Order on Mot. for Third Party Disc. and Order Postponing Hr’g and Revising Case Schedule at 3 (EPA ALJ, Dec. 28, 2011). As discussed in more detail below in connection with the potential deponents, AMVAC asserts that this factor could form an independent ground for requiring depositions because: (1) the complexity of the issues necessitates eliciting testimony via deposition in advance of a hearing, when time will be less constrained; and (2) OPP may not even call certain witnesses who will be the only potential source of relevant information.

B. AMVAC’s Request Topics and Categories for Written Discovery Satisfy the Standard

The following sections break out AMVAC’s proposed written discovery requests by topic (or type of request) and explain why each topic (or type of request) is relevant and meets the criteria in the regulation. Because the first several sections below focus on topic, and the final four focus more on the nature of the document, there are some requests that are associated with more than one section below. AMVAC has drafted all the requests as narrowly as possible to ensure that only information in EPA’s possession is being sought and to seek the most relevant information without introducing the potential for unreasonable delay. AMVAC asserts that all the written requests are well within EPA’s ability to comply by the date that the Presiding

Officer has set for the close of discovery (December 2, 2022). To the extent OPP argues otherwise, the Presiding Officer should carefully scrutinize OPP's arguments.

1. *Typicality*

The EAB held that whether AMVAC's actions were "typical of how registrants address data call-ins" is material to whether AMVAC took appropriate steps in connection with the DCPA data call-in. Remand Order, 18 E.A.D. at 790. OPP contends that AMVAC's actions were not typical but rather were "abnormally" dilatory and/or repetitive and that the amount of time that passed since the DCI is atypically long. Bloom Statement at 5-6. The requests discussed below in Section II.B.3 are drawn to confirming which specific acts OPP asserts were "abnormal" in some way, but the only way to put OPP's assertions in context is to obtain context for what is "normal." More information about how other registrants have approached similar data call-ins and whether it is actually atypical for some requests to remain outstanding for comparable lengths of time is therefore required.

AMVAC has an expert witness who can testify concerning his experience in this regard; however, the debate about typicality need not (and should not) come down to a credibility contest between Mr. Gur (and possibly others from AMVAC) and Ms. Bloom (and possibly others from EPA). OPP should have readily available data that will tend to support or refute its assertion that AMVAC's response to this DCI was in some way not "typical," as OPP has already asserted. And if OPP does not possess this data, that fact alone would call into question the weight that should be given to the Agency's prior statements concerning this issue.

The following requests seek facts that will allow a full exploration of whether AMVAC's response to the DCI was "abnormal" as OPP asserts:

| <i>Typicality</i> | | |
|-------------------------------|------------------------|--------------------------|
| Requests for Admission | Interrogatories | Document Requests |
| 4-9 | 1-3, 8 | 5, 6, 12, 13 |

2. *Course of Performance/Extensions/Waivers*

The EAB held that the “course of performance” between the parties was material in general, and specifically with respect to whether extension requests were required or expected. Remand Order, 18 E.A.D. at 790. The course of performance with respect to the handling of waiver requests should also be relevant. AMVAC is proposing several requests relevant to the course of performance. AMVAC asks OPP to admit that it never advised AMVAC that extensions were needed and did not respond on the single occasion that AMVAC asked about an extension (RFAs 17, 18). RFP 24 asks for documents to corroborate any refusal to admit RFA 17.

| <i>Course of Performance/Extensions</i> | | |
|---|------------------------|--------------------------|
| Requests for Admission | Interrogatories | Document Requests |
| 17-18 | | 24 |

3. *OPP Contentions Regarding Specific AMVAC Actions*

Because the EAB confirmed that the “appropriate steps” standard requires more than simply showing that a study was not submitted prior to the NOITS, OPP must identify which actions taken by AMVAC “were not appropriate.” Remand Order, 18 E.A.D. at 790. To avoid wasting time at the hearing, AMVAC is proposing a set of requests that ask OPP to officially state its position on which actions were appropriate or fall into categories that OPP has suggested are probative of whether an action was appropriate. These include whether that action was “dilatory,” “repetitive,” or unsubstantiated. *See Bloom Statement* at 6. OPP has not identified with specificity which actions it believes fall into these categories and why. Several of these

requests also ask OPP to admit whether it believes AMVAC was responsible for any delay during periods of time while submitted materials were under review by EPA. These requests will help focus the issues for the hearing. The following requests fall into this category:

| <i>OPP Contentions Regarding Specific AMVAC Actions</i> | | |
|---|------------------------|--------------------------|
| Requests for Admission | Interrogatories | Document Requests |
| 11-14 | 9-11, 14-18 | 12, 13 |

4. *Time Frames in the DCI*

In view of the Remand Order, the Presiding Officer has ordered additional briefing on the meaning of the phrases “within the time required by the Administrator” and “failed to take appropriate steps to secure the data required” within the statutory language. Discovery Order at 2-3. The parties dispute whether the time frames for each data requirement set out in the DCI provided adequate time to complete certain data requirements. *Compare Gur Statement at 5-7 with Bloom Statement at 3.* The parties also dispute what activities are meant to occur within those time frames, with OPP suggesting that EPA may insist on being able to complete its review before a data requirement is satisfied. *See OPP Mot. Acc. Dec., Dkt. 12, at 41.* The requests in this category will elicit information concerning whether OPP itself understands the timelines set out in the DCI to include time for necessary review of protocols and OPP’s own review of the data submitted. These requests ask for information and documents relevant to whether there is any factual evidence to support the Agency’s claims about the time frames set out in the DCI.

| <i>Guideline Time Frames</i> | | |
|-------------------------------|------------------------|--------------------------|
| Requests for Admission | Interrogatories | Document Requests |
| | 6, 7 | 9, 10 |

5. *Ability to Proceed with Risk Assessment*

AMVAC has asserted that it has been common for EPA to proceed with risk assessments in the past and reevaluate the need for certain data requirements or label amendments in view of the results of a risk assessment. Gur Statement ¶ 39. AMVAC also asserts that EPA made statements suggesting to AMVAC that EPA would follow that course in this DCI as well. *E.g.*, JX 21 (indicating that EPA would use conservative assumptions in the risk assessment where data was not yet available).⁴ OPP has claimed that uncertainty arising from the lack of some data prevented it from proceeding with a risk assessment or that there would be “excessive uncertainty” if it did so. Bloom Statement at 5. It is relevant the extent to which OPP did “typically” proceed with risk assessments in comparable circumstances in the past, and whether EPA’s claims that uncertainty in the case of DCPA was so “excessive,” are scientifically supported. The following requests seek: (1) admissions concerning OPP’s failure to advise AMVAC, prior to the NOITS, that it believed it could not proceed with a risk assessment; (2) admissions and documents concerning other cases in which EPA has issued risk assessments notwithstanding the fact that data requirements were outstanding; and (3) information concerning the Agency’s criteria for when risk assessments can or cannot proceed.

| <i>Ability to Proceed with Risk Assessment</i> | | |
|--|------------------------|--------------------------|
| Requests for Admission | Interrogatories | Document Requests |
| 2, 9, 10 | 2 | 11, 14 |

6. *Communications between PRD Team Leader and CRMs; PRD Files*

RFPs 1-2 ask for copies of communications (including emails) between PRD team leader Jill Bloom and the DCPA Chemical Review Manager (“CRM”), and between any two of the

⁴ “JX” and a number refers to the correspondingly numbered Joint Exhibit previously filed with the Parties’ initial prehearing exchange.

individuals who have served CRM for DCPA since the issuance of the DCI concerning either the DCPA DCI or the registration review of DCPA. RFPs 3 and 4 seek other paper and electronic files from PRD concerning the DCPA DCI or the registration review of DCPA. Specifically, these requests seek:

- (1) copies of all communications between Jill Bloom and [the CRMs] that refer to or discuss the DCPA DCI, any data requirement in the DCPA DCI, the performance of a risk assessment for DCPA, or the registration review of DCPA.
- (2) copies of all communications between any two [DCPA CRMs] that refer to or discuss the DCPA DCI, any data requirement in the DCPA DCI, the performance of a risk assessment for DCPA, or the registration review of DCPA.
- (3) copies of any paper files maintained by PRD concerning the DCPA DCI or the registration review of DCPA.
- (4) copies of any electronic files (other than emails) maintained by within a PRD electronic database concerning the DCPA DCI or the registration review of DCPA.

Documents within these categories are expected to be relevant to one or more of the issues discussed in the prior five sections (typicality, course of performance, OPP's specific contentions about impropriety, guideline time frames, and the ability to proceed with risk assessment). Obtaining the communications in RFPs 1 and 2 should not be overly burdensome given that one would expect a small set of key words (*e.g.*, DCPA, Dacthal, and/or the numerical identifier for the DCI) to reliably return these emails from OPP's system from Ms. Bloom and the limited number of individuals who have served as CRM since the issuance of the DCI.

Likewise, with respect to RFP 3, OPP should easily be able to confirm the existence or non-existence of a centralized paper file. For RFP 4, AMVAC expects that any documents pertaining to the DCI or registration review would already be centrally maintained. AMVAC anticipates that RFP 30 (seeking internal records of meetings with AMVAC) should be subsumed within either RFP 3 or RFP 4. Requests in this category include, as noted above:

| <i>Communications between PRD Team Leader and CRMs; PRD Files</i> | | |
|---|------------------------|--------------------------|
| Requests for Admission | Interrogatories | Document Requests |
| | | 1-4, 30 |

7. *Agency Operating Procedures/Policy Statements*

Because the EAB has identified “typicality” of the interaction between AMVAC and OPP as being relevant to the question of whether appropriate steps were taken, it is correspondingly relevant what OPP required of other registrants. Remand Order, 18 E.A.D. at 770. Only against the backdrop of the Agency’s interactions with other registrants can the “typicality” of the AMVAC DCI response be evaluated. Requests pertaining to the completion of DCIs by other registrants are discussed in Section II.B.1, above.

An additional relevant category of relevant evidence concerning “typical” conduct of DCIs is: (1) copies of any documents reflecting “standard operating procedures” covering relevant elements of the DCI, such as waiver and extension requests, and agency review of protocols and submitted data; and (2) information about any recent announcements concerning these same policies. The existence/non-existence/content of these documents are probative of typicality, because it will show some evolution of policies across time (to the extent there is any), or whether AMVAC’s conduct was not out of compliance with any policy in effect at the relevant time. Likewise, recent statements indicating that OPP is changing policies relevant to

DCIs (or perhaps, asserting that it is changing how it is enforcing existing policies) are probative of what was considered by OPP to be “typical” in the past.

EPA may argue in response to these inquiries, and perhaps others concerning historical responses to DCIs, that the contents of these policies, or how other DCIs were addressed by EPA and registrants, are not material because the agency has some degree of enforcement discretion and is not bound to treat like cases exactly alike. *E.g., In re Newell Recycling Co.*, 8 E.A.D. 598, 642 (EAB 1999) (discussing the application of the principle in penalty cases). The principle of enforcement discretion is not applicable here, where the Presiding Officer is called upon to rule under a statutory standard *incorporating* a notion of propriety that the EAB has held is informed by both the typicality of AMVAC’s conduct and the “course of performance” of the parties. Remand Order, 18 E.A.D. at 790. EPA’s past interpretation of, and application of, its procedures and the corresponding conduct by registrants are relevant to this inquiry. The following requests fall into this category:

| <i>Agency Operating Procedures/Policy Statements</i> | | |
|--|------------------------|--------------------------|
| Requests for Admission | Interrogatories | Document Requests |
| | 4, 5 | 7-10, 14 |

8. *Non-Issuance/Receipt of Documents*

This category of requests is calculated to narrow the issues for hearing by asking OPP to confirm that it either never issued nor reviewed a certain document (either at all, or within a specified time frame) or that it did receive a certain document. Some of these requests are drawn to specific documents (*e.g.*, RFA 1) whereas some ask OPP to admit that it did not issue any document (or other statement) with specified contents (*e.g.*, RFA 3, asking EPA to admit that it never asserted it could not proceed with a risk assessment in the several years leading up to the issuance of the NOITS). There were several instances over the course of the DCI in which

AMVAC believes it did not receive a document until long after the date on the document. *E.g.*, JX 37-39 not being provided to AMVAC until 2017 (RFA 38). Several of these requests will confirm that these documents were not sent to AMVAC earlier, eliminating the need to elicit confirmation of these from an EPA witness on the stand (who may assert a lack of recollection).

| <i>Non-Issuance/Receipt of Documents</i> | | |
|---|------------------------|--------------------------|
| Requests for Admission | Interrogatories | Document Requests |
| 1, 3, 15, 16-18, 23, 25, 27, 31, 38, 40, 41, 43, 45, 46 | 12 | 12, 16, 21, 22, 24, 29 |

9. *Requests Concerning Specific Data Requirements*

In addition to the general topic area requests discussed above, AMVAC is also proposing a set of requests that relate to individual studies. As indicated in n.1, *supra*, AMVAC has not included any requests directed to the three data requirements that OPP indicated in its recent status report on October 21, 2022 (expected to be Dkt. 34), that it considers satisfied, or with respect to which it will no longer pursue suspension.

Requests in this category ask EPA: (1) for admissions regarding the interpretation of specified documents relevant to specified individual studies (*e.g.*, RFAs 21, 32); (2) to admit that specified correspondence from AMVAC was not “dilatatory, repetitive, or otherwise unsubstantiated” (*e.g.*, RFAs 20, 22); and (3) to admit that EPA did not review certain documents within specified timeframes (*e.g.*, RFA 23). Requests in this category also ask for communications relevant to each data requirement covering specified topics, including evaluation of waiver requests, ability to proceed with risk assessment in view of the available data, and the evaluation of submitted data (*e.g.*, RFP 17). Requests in this category are relevant as they may pertain to issues of typicality, course of performance, ability to proceed with risk

assessment, and the agency’s internal evaluation of the propriety of AMVAC’s conduct in a pre-litigation posture.

AMVAC has structured the requests in this fashion to avoid making a broader request for *all* communications from the larger group of individuals potentially implicated by these requests (*i.e.*, personnel within PRD, EFED, and HED that worked with DCPA). However, if it would be administratively easier for OPP to provide all communications from the named individuals concerning the DCPA DCI, AMVAC would be willing to adjust its request. Requests in this category (both the RFAs as discussed above, and the RFPs and INTs) include:

| <i>Requests Concerning Specific Data Requirements</i> | | |
|---|------------------------|--------------------------|
| Requests for Admission | Interrogatories | Document Requests |
| 19-42, 44-49 | 13 | 15-20, 23, 25-28, 31 |

C. OPP’s Limited Voluntary Compliance Does Not Negate Need for Other Requests

On October 24, 2022, OPP advised that it would comply with an unspecified number of RFAs, but it did not provide any information about which ones. As such, the rationale for ordering compliance with all of them is set forth above. Additionally, OPP advised that it would not make any of its personnel available for depositions voluntarily. Finally, OPP advised that it would voluntarily comply with INTs 8, 11, and 13 and RFPs 11, 21, and 22. The fact that OPP has agreed to voluntarily produce some documents does not provide a basis for not requiring compliance with the other requests – in fact, it further highlights the need to do so.

With regard to INT 11, OPP clarified (for the first time) that when it stated “Inadequate 90-day response received” for several data requirements in Table 2 of the NOITS (87 Fed. Reg. at 25,264, JX 2) it meant that these were data requirements for which AMVAC had initially elected one method of complying with the DCI, but then later selected an alternate method of

compliance. While this is somewhat helpful for narrowing the issues AMVAC would have to ask witnesses about at a hearing, it does not help explain EPA's specific contentions as to why AMVAC's responses (under an alternate method that is a recognized method of satisfying data requirements) were not appropriate. OPP has declined to answer requests on that issue, as explained above.

With regard to INT 13, OPP is willing to identify all other registrants it has asked to perform a study similar to SS-1072, but it is not willing to advise what the status is of those requests (INT 1) or whether OPP has proceeded with risk assessments or to issue other documents in the registration review process despite potentially not having received the data (INT 2, 3). This additional information about the other registrants is probative of whether AMVAC's conduct was typical.

With regard to INT 8, OPP is willing to state "what other DCIs Jill Bloom was comparing the DCPA DCI to in connection with each of the comparative statements in the following quote from pp. 4-5 of her prior Verified Written Statement," but responses to other requests would be needed to determine if the comparators Ms. Bloom used were comprehensive or appropriate (*e.g.*, INTs 2, 3, RFP 6). EPA is also unwilling to provide any documents that would explain the basis for Ms. Bloom's comparative statements, requiring these topics to be covered for the first time at the hearing (*e.g.*, RFPs 12, 13).

OPP's voluntary production of documents is also very limited. For RFP 11, it indicated that no responsive document exists. For RFPs 21 and 22, OPP committed to review its files to ensure that all such "transmittal memos" had been uploaded to the docket. Thus, to the extent any materials are responsive to this request, they should already have been made public (or provided to AMVAC) but were not.

It is clear from its October 24 response that OPP's agreement to voluntarily produce some documents is extremely limited and does not affect the analysis that the remainder of the discovery sought meets the criteria in the regulation, and that there still remains good cause for requiring it to be produced.

D. AMVAC's Requests for Depositions Satisfy the Standard

Depositions play an important role when, as here, the Presiding Officer will be called upon to decide complex questions. *In re Easterday Janitorial Supply Co.*, Docket No. FIFRA-09-99-0015, Order Granting Mot. for Deps. (EPA ALJ, Dec. 13, 2000). Specifically, depositions are crucial to discover the “conclusions of the witnesses in question, as well as the basis for those conclusions.” *Id.* at 2. Written discovery, even when available, cannot fully substitute for the ability of “the give and take of an oral deposition ... to obtain a more complete understanding of [witnesses'] reasoning” *In re Nicor Gas*, Docket No. TSCA-HQ-2015-5017, Order on Respondent's Mot. for Additional Disc. and for Extension of Time at 3 (EPA ALJ, Nov. 22, 2016).

Depositions are appropriate where witnesses have reserved the right to provide expert testimony. OPP has reserved its right to have several of its witnesses testify as experts. Respondent's Prehearing Exchange, Dkt. 17, at 2-4 (referring to witnesses in Section II.D.5, below). Depositions are also appropriate where the information in the prehearing exchange does not clearly delineate the Agency's position on key issues. *See In re Taotao USA, Inc., Taotao Grp. Co., and Jinyun Cnty. Xiangyuan Indus. Co.*, Docket No. CAA-HQ-2015-8065, Order on Respondents' Mot. to Take Deps. at 1 (EPA ALJ, July 7, 2017) (Biro, J.) (citing *Nicor*). Here, even after a round trip to the EAB, the Presiding Officer still seeks from OPP (and AMVAC) more information concerning the precise meaning of the statutory phrases “within the time required by the Administrator” and “failed to take appropriate steps to secure the data required.”

Discovery Order at 2-3. The precise factual bases on which OPP personnel rested their conclusions that AMVAC had *not* complied with the statutory standard prior to issuing the NOITS is worth exploring via deposition, as well is how AMVAC's conduct was or was not typical of other registrants, to ensure that the issues are as narrowly framed for the hearing.

Finally, as AMVAC noted in its Opposition to OPP's motion to eliminate discovery, a hearing in which the parties are probing the bases of each other's assertions for the first time is not in the interests of the Presiding Officer or the parties. Permitting depositions will narrow the issues for hearing and hopefully ultimately expedite the resolution of this matter by streamlining the hearing record and post-hearing proceedings. AMVAC is requesting depositions of the following EPA personnel, for the reasons, and on the topics, set forth below:

1. *Fed. R. Civ. P. Rule 30(b)(6)*

Fed. R. Civ. P. 30(b)(6) provides that "a party may name as the deponent a . . . governmental agency . . . and must describe with reasonable particularity the matters for examination. The agency must then designate one or more individuals to testify on its behalf; and it may set out the matters on which each person designated will testify." A 30(b)(6) witness (or witnesses) must testify "as to information known or reasonably available to the organization." *Id.* Because AMVAC is seeking, *inter alia*, historical facts about other registrants' responses to DCIs, and OPP's positions concerning the actions taken by AMVAC during the course of the DCI, a 30(b)(6) deposition would be an efficient and procedurally appropriate mechanism to obtain this information. With regard to some of the topics discussed below, it is the agency's positions and knowledge that AMVAC seeks, rather than one agency employee's understanding of those positions and historical facts. The overall number of depositions might be reduced (to the extent individual testimony was no longer needed) if a 30(b)(6) deposition is conducted.

AMVAC asks that the Presiding Officer order EPA to make available a 30(b)(6) witness on each of the topics that we also discussed below in connection with any individual proposed witness.

2. *Michael Goodis*

Mr. Goodis, in his capacity as the OPP Deputy Director of Programs, oversees both PRD as well as two other divisions relevant to the DCPA DCI, HED and EFED. He is the most senior individual whose deposition AMVAC is seeking. The work of these other divisions is relevant to OPP's assertion that the agency could not proceed with a risk assessment. AMVAC understands that OPP does not intend to call Mr. Goodis as a witness at the hearing. Therefore, there is a basis to conclude that (absent a subpoena) relevant and probative evidence in Mr. Goodis' possession may otherwise not be available for presentation at a hearing. In addition to standard deposition topics such as his experience, C.V., and the factual details of his involvement with the DCPA DCI and the NOITS, and the existence of other facts, documents, or witnesses relevant to the claims in the proceeding, AMVAC requests leave to depose Mr. Goodis on:

- (1) policies concerning risk assessments and HED/EFED's communications with PRD;
- (2) whether OPP's analysis of the support for its existing stocks order has changed now that OPP has accepted that the CTA study satisfies the applicable data requirement (or for any other reason);
- (3) the time the Agency requires to review protocols and submitted data;
- (4) any changes in OPP policies that either resulted in, or resulted from, the issuance of the NOITS, as relevant to whether AMVAC's conduct was typical of prior DCI responses;
- (5) what constitutes appropriate steps in the Agency's view toward adequately responding to a DCI; and

(6) how does OPP determine when a notice of intent to suspend is appropriate in the context of the obligation to respond to a DCI.

3. *Mary Elissa Reaves*

Dr. Reaves, in her capacity as the Director of PRD, is the signatory of both the letter to AMVAC advising it that EPA intended to suspend DCPA as well as the associated Federal Register Notice. JX 1, JX 2. She is therefore presumably the Agency employee with the most immediate knowledge of the basis for the NOITS and should be able to explain why OPP concluded that AMVAC had run afoul of the statutory standard. Dr. Reaves could also provide testimony regarding applicable policies concerning risk assessments, waivers, and extensions, which are relevant for the reasons set forth in the corresponding sections concerning RFAs and RFPs above.

Additionally, AMVAC understands that OPP does not intend to call Dr. Reaves as a witness at the hearing, despite the fact that she is the signatory of the NOITS. Therefore, there is a basis to conclude that (absent a subpoena) relevant and probative evidence in Dr. Reaves' possession may otherwise not be available for presentation at a hearing. In addition to standard deposition topics such as her experience, C.V., and the factual details of her involvement with the DCPA DCI and the NOITS, and the existence of other facts, documents, or witnesses relevant to the claims in the proceeding, AMVAC requests leave to depose Dr. Reaves on, as set forth in more detail above:

- (1) the factual basis for the NOITS;
- (2) facts within her knowledge concerning other registrants and the typicality of AMVAC's conduct;

- (3) whether OPP's analysis of the support for its existing stocks order has changed now that OPP has accepted that the CTA study satisfies the applicable data requirement (or for any other reason);
- (4) applicable policies concerning risk assessments, waivers, and extensions;
- (5) how policies are communicated to EPA personnel and to registrants.

4. *Jill Bloom*

Ms. Bloom has been extensively involved with the DCPA DCI as the lead environmental protection specialist in the Risk Management and Implementation Branch Five. Ms. Bloom offered the sole Verified Written Statement in the prior Prehearing Exchange that was focused on EPA's basis for the NOITS as opposed to individual data requirements. In that statement, she made numerous comparative claims regarding AMVAC's conduct and the conduct of other registrants. *See Bloom Statement at 5-6.* It was Ms. Bloom's statements in this regard that the EAB found to materially conflict with opinions of AMVAC's expert witness Mr. Gur in ruling that "typicality" was a relevant issue for hearing. *Remand Order, 18 E.A.D. at 790.* Ms. Bloom's statements that AMVAC was not "typical" in its response to the DCI (*i.e.*, "abnormal") are well suited for exploration at a deposition. While AMVAC has directed some INTs and RFPs to this topic, a full explanation of Ms. Bloom's reasoning, including her precise intent when using words and phrases like "dilatory," "repetitive," and "additional, substantive rationale" are most naturally explored in the context of a deposition. *Bloom Statement at 5-6.*

In addition to standard deposition topics such as her experience, C.V., and the factual details of her involvement with the DCPA DCI, and the existence of other facts, documents, or witnesses relevant to the claims in the proceeding, AMVAC requests leave to depose Ms. Bloom on the facts relevant to the DCI and the assertions in her Statement:

- (1) concerning how DCI time frames are established;

- (2) that compare AMVAC's conduct in response to the DCI to that of other registrants;
- (3) that risk assessments could not be prepared for DCPA based on the data available as a result of "excessive" uncertainty (or that the "risk picture is so uncertain that EPA cannot even make conservative estimates") Bloom Statement at 5, 7;
- (4) that AMVAC's conduct was "dilatory," "repetitive," or, in some instances, that AMVAC did not offer "substantive rationale[s]" for waiver requests, *id.* at 5-6; and
- (5) what EPA policies she understood to apply to the DCPA DCI concerning waiver requests, extension requests, or otherwise, and how the content of such policies informed her assessments of AMVAC's conduct.

5. *Danette Drew, Christina Wendel, Stephen Went*

Danette Drew, Christina Wendel, and Stephen Went are EPA scientists with HED (Ms. Drew) and EFED (Ms. Wendel and Dr. Went) who supplied Verified Written statements each concerning several of the data requirements at issue in this matter. OPP also indicated that all three of them may present expert testimony in rebuttal at a hearing. The Verified Written Statements of these three witnesses set out EPA's conclusions regarding the scientific merit of AMVAC's waiver requests and data submissions. In addition to standard deposition topics such as their experience, C.V.s, the factual details of their involvement with the DCPA DCI, and the existence of other facts, documents, or witnesses relevant to the claims in the proceeding, AMVAC requests leave to depose these three witnesses regarding:

- (1) the factual and scientific bases for their statements concerning the scientific merit of AMVAC's waiver requests and data submissions;
- (2) EPA's ability to complete a risk assessment absent additional data;

- (3) the degree of uncertainty that would be involved in doing so; and
- (4) how EPA has handled such uncertainty in similar cases.

IV. CONCLUSION

To narrow and simplify the hearing, to ensure full and fair exploration of the issues involved in this novel and important proceeding, and because the criteria for additional discovery in the applicable regulations are otherwise satisfied, AMVAC's Motion for Additional Discovery should be granted. The Presiding Officer should order EPA to respond to the discovery requests included as **Attachments A & B** to this Motion as soon as practicable but in no event later than the close of discovery according to the updated schedule set forth in the Discovery Order (December 2, 2022). The Presiding Officer should further order that the EPA personnel identified above (and/or a 30(b)(6) deponent on some or all topics) be made available for depositions at a time to be agreed between OPP and AMVAC.

Date: October 25, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Petitioner AMVAC Chemical Corporation's Motion for Additional Discovery**, was sent on October 25, 2022, to the following parties in the manner indicated below.

/s/ Hume M. Ross
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Dated October 25, 2022