

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

1996 JAN 24 11 12:05

In the Matter of:

Health Care Products, Inc.  
Respondent

) FIFRA Docket No. 93-H-02F

In the Matter of:

Celltech Media, Inc.  
Respondent

) FIFRA Docket No. 95-H-04

In the Matter of:

Health Care Products, Inc.  
Respondent

) I.F. & R. Docket No. VIII-90-279C

In the Matter of:

Health Care Products, Inc.,  
Petitioner

) FIFRA Docket No. 656<sup>1</sup>

ORDER GRANTING REVISIONS TO FILING SCHEDULE

On January 11, 1996,<sup>2</sup> the U.S. Environmental Protection Agency (Agency), Complainant in Docket Nos. FIFRA 93-H-02F, FIFRA 95-H-04 and I.F. & R. VIII-90-279C, and Respondent in FIFRA Docket No. 656, filed a Motion for Revisions to the Filing Schedule. This motion requested that the filing schedule established at the August 30, 1995 prehearing conference and confirmed in the September 22, 1995 orders issued herein, be revised to account for the closures

<sup>1</sup> This cancellation case is not consolidated with the three enforcement proceedings listed in the caption, but all four cases are included since this order applies to all of these actions.

<sup>2</sup> According to a letter of January 16, 1996, Agency counsel sent the motion to HCP's counsel by facsimile process on January 11, 1996, but, because of a further Agency shutdown on January 12, 1996, the Agency was unable to dispatch the service copy of the motion for revision to the schedule until January 16, 1996.

of the Agency occasioned by the Federal government shutdowns that occurred November 14, 1995 and December 16, 1995 because of the budget impasse, and the Agency shutdown that happened January 8-10, 1996 because of a blizzard. The motion notes that the first budget shutdown lasted until November 20, 1995, that the second budget shutdown ended January 6, 1996, and that the blizzard closing did not end until January 11, 1996. The motion for revision asks that, because of these unavoidable delays, the dates set in the schedules of the consolidated enforcement actions and the cancellation hearing be extended 32 days to account for the time lost during the government closures. The requested extension is asked to be made applicable to all parties and the motion further requests that the schedules be further extended to account for the time necessary to rule on the motion. Also, the Agency requests that any further closure of the Agency result in an extension of outstanding deadlines on a day for day basis.

On January 16, 1996, because of time constraints relating to schedule deadlines, the Presiding Judge contacted counsel for Health Care Products, Inc. (HCP) to ascertain if any opposition would be filed to the Agency's motion to revise the schedule. Counsel for HCP advised that he wished to review the recently received pleading and, pursuant to Section 22.16(b) of the EPA Rules of Practice, 40 C.F.R. §22.16(b), the Presiding Judge shortened the response time to January 23, 1996 because of time limitations, and directed HCP to serve any response pleading by facsimile process.

On January 23, 1996, HCP filed an opposition to the Agency's motion to revise the schedule. This opposition recites that the government shutdown is not a fair reason to extend the Agency filing deadlines; that the Agency did not file its motion in a timely fashion; and also objects to the Presiding Judge's direction of a shortened response time to the motion. The opposition also complains that HCP has been unfairly prejudiced by the Agency's alleged failure to take reasonable steps to notify HCP that the Agency would not send its prehearing exchanges in the enforcement cases and that it has suffered prejudice by filing its prehearing exchanges in those cases without the Agency doing likewise. As to the cancellation case, HCP asserts that the Agency has had more than enough time to prepare its objections to HCP's October 30, 1996 amended objections to the Notices of Intent to Cancel. HCP equates the motion to strike objections to a motion to strike affirmative defenses and attacks such motions as being not favored. HCP also reiterated its suggestion that a settlement judge be appointed.

The Agency, on January 23, 1996, filed a motion for leave to reply to HCP's opposition to the motion for revisions. However, further pleading on this procedural matter is not warranted and the motion for leave to reply is hereby denied.

On analysis, the Agency position is clearly more persuasive and a revision of the filing schedule is warranted because of the government closures. The two budget closures were not the result of any Agency action and the Agency lawyers were legally precluded from working during these periods. Moreover, the blizzard was certainly not a result of Agency action and there was no reasonable way for Agency counsel to function during this period. Moreover, HCP has not set out any specific prejudice from having filed its prehearing exchanges in advance of the Agency in

the three enforcement cases. If any specific prejudice can be shown as those cases proceed, HCP can seek relief by appropriate motion. In addition, the shortening of the motion response time is a discretionary action authorized under Section 22.16(b) of the Rules, and the HCP objection thereto is a hollow complaint in view of the obvious time constraints occasioned by the government shutdowns. In light of the above analysis, the Agency motion for revisions to the filing schedule is granted and the following schedule is hereby set in the enforcement cases and the cancellation proceeding:

#### **Cancellation Proceeding**

February 26, 1996 -- Agency is to file any motions to limit the hearing issues and/or to strike portions of HCP's objections to the original and amended NOITCs.

April 1, 1996 -- HCP is to file its responses to any Agency motions to limit hearing issues and/or to strike objections.

#### **Enforcement Proceedings**

February 26, 1996 -- Agency is to file its prehearing exchanges by first class mail.

March 11, 1996 -- Parties are to file any motions seeking discovery.

March 25, 1996 -- Parties are to file responses to any discovery motions filed March 11, 1996.

April 15, 1996 -- A prehearing conference will be held for rulings on discovery motions, for further scheduling, and for any other matters that may aid in the orderly disposition of these cases.