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

In re:	)	
	)	
Bayer CropScience LP, and Nichino America, Inc.	)	FIFRA Appeal No. 16-(01)
	)	
Docket No. FIFRA-HQ-2016-0001	)	
	)	

APPELLEE'S OPPOSITION TO APPELLANTS' MOTION TO REOPEN HEARING

Pursuant to the Environmental Appeals Board's June 9, 2016 Revised Order Establishing Deadlines and Procedures for Appeals, the Appellee in this matter, the U.S. Environmental Protection Agency ("EPA"), hereby submits this opposition to Appellant's Motion to Reopen Hearing.

I. INTRODUCTION

As stated in their motion, Appellants, Bayer Cropscience LP and Nichino America, Inc. ("Registrants"), seek to reopen the hearing to enter evidence excluded by the ALJ's May 3, 2016 Order on Registrants' Motion to Limit Scope of Testimony ("MTL") and the ALJ's May 10, 2016 ruling at hearing during cross-examination of Susan Lewis. Regarding the evidence excluded by the MTL Order, EPA notes that the

ALJ's earlier April 25, 2016 Order on Registrants' Motion for Accelerated Decision ("MAD") denying an accelerated decision made clear that the hearing was properly subject to FIFRA section 6(e) and was limited by section 6(e) to whether Registrants had initiated and pursued appropriate action to comply with the conditions of their registrations and whether the existing stocks determination was consistent with FIFRA.[1] The MTL Order limited evidence concerning the latter issue – whether the Administrator's determination with respect to existing stocks was consistent with FIFRA.

II. ARGUMENT

A. The Evidence was Properly Excluded as Irrelevant

While Registrants frame their request to reopen the hearing to enter evidence excluded by the May 3, 2016 Order and an at-hearing ruling during cross-examination, their motion is a clear attempt to introduce evidence to argue whether the conditions attached to their registrations were lawful. EPA's arguments concerning the lawfulness of the conditions are described more fully in its Response Brief and are not repeated here. Registrants also contend that the evidence they wish to have admitted is relevant to the question of whether Registrants failed to comply with a condition of registration. Yet, as the ALJ found, Registrants "do not dispute that 'voluntary withdrawal' was a condition of their conditional registration and that they did not comply with that

[1] While the ALJ's MTL Order explains that evidence is only admissible insofar as it is relevant to a material issue for the hearing, it was the ALJ's MAD Order that limited the scope of hearing and limited the material issues to whether the conditions were met and whether EPA's existing stocks determination was consistent with FIFRA. While the MTL Order allows Registrants to make a written offer of proof concerning whether flubendiamide products have an unreasonable adverse effect on the environment, EPA contends that the admissibility of such evidence is based on the correctly-decided MAD Order.

condition." (MAD Order at 28.) Registrants make no suggestion that they have changed their position on whether a voluntary cancellation was sought and thus whether they met this condition of their registrations.

To the extent the evidence they seek to have admitted by reopening the hearing actually pertains to whether EPA was justified in how it made its existing stocks determination, evidence on the risks and benefits of flubendiamide was properly excluded because it was irrelevant to EPA's determination. EPA's arguments are more fully explained in its Response Brief and are not repeated here. (EPA Response Brief at 20-24.)

During the hearing, the ALJ ruled that certain documents relating to a different cancellation hearing, *In the Matter of Reckitt Benckiser LLC, et al.*, FIFRA Docket No. 661, were irrelevant and inadmissible. Again, Registrants fail to show how this evidence is relevant to the facts at issue in the hearing – namely whether Registrants met the conditions of their registration and whether EPA's determination on existing stocks was proper. This argument also addressed in EPA's Response Brief and not repeated here. (EPA Response Brief at 34-36).

B. The Record is Complete for the EAB's Consideration and in the Event of a Judicial Appeal

As acknowledged in Registrants' Motion for Accelerated Decision, whether a condition is lawful is a matter of law rather than fact. No factual evidence need be admitted in order to preserve this legal argument for the EAB's consideration or for judicial appeal. Further as the ALJ correctly found, EPA's determination on existing stocks was based on Registrants' conduct in intentionally refusing to comply with a

specific condition of registration – a condition that they knew was central to EPA's decision to issue the registrations – and not on scientific or economic considerations. The ALJ held that EPA's conduct-based determination on existing stocks was consistent with FIFRA and did not involve an examination of the risks and benefits of flubendiamide. Corrected Initial Decision at 36. As nothing obligated the Administrator to consider the risks and benefits and the Administrator's existing stocks determination does not rely on an evaluation of risks and benefits, there is no factual dispute over how such risks and benefits were assessed. Thus, no additional evidence is material to, and certainly not necessary for, the resolution of any issue appropriate for consideration in the instant proceeding. Because the identified evidence is not relevant to the proceeding, Registrants would not be prejudiced by not reopening the hearing at this time.

C. Reopening the Hearing Could Delay the Proceeding

EPA continues to assert that the matter at hand is a simple issue of whether Registrants complied with a procedural condition of registration and whether the Administrator's determination regarding existing stocks is consistent with FIFRA. The ALJ noted that Congress intended for FIFRA section 6(e) proceedings to be expeditious, and carefully limited their scope:

> In fact, the legislative history of the addition of the conditional registration provisions suggests the opposite. *See* H.R. Rep. No. 95-343, at 10–11 (1977) ("We strongly believe that the Agency should be required to cancel the registration if the conditions are not met within the appropriate time interval, and that any hearing on such cancellation should be confined to whether or not the conditions were met and how existing stocks should be handled. *Public resources should not be devoted to long, drawn-out cancellation procedures for these types of registrations."*) (emphasis added). Order on Motion for Accelerated Decision at 22.

No proceeding should burden the ALJ or EAB with superfluous evidence, least of all a section 6(e) proceeding. Nevertheless, should the EAB decide that the scope of a 6(e) hearing is broader, and therefore reopen the hearing, EPA's prior expectations about the scope of the proceeding should not bar EPA from responding to Registrants' new evidence. Further, EPA disputes that a recitation of EPA's expectation that it would not present any factual testimony on risk-benefit issues (MTL Order p 5) suggests that the ALJ relied on those representations as a material condition of her decision limiting the testimony on existing stocks. EPA does not expect to request an opportunity to enter additional evidence, but it reserves the right to make such a request. And if it is determined that the information is relevant to the issues in the 6(e) proceeding, EPA might well want the opportunity to question or challenge the evidence put forward by Registrants.

III. Conclusion

For the foregoing reasons, EPA urges the EAB to deny Registrants' Motion to Reopen Hearing.

Dated: June 20, 2016

Respectfully Submitted,

Ariadne Goerke
Scott B. Garrison
Robert Perlis
Michele L. Knorr
U.S. Environmental Protection Agency
Office of General Counsel (2333A)
1200 Pennsylvania Ave., N.W.
Washington, D.C. 20460
goerke.ariadne@epa.gov
garrison.scott@epa.gov
perlis.robert@epa.gov
knorr.michele@epa.gov

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2016, a true and correct copy of *Appellee's Opposition to Appellants' Motion to Reopen Hearing* was filed electronically using the EPA EAB e-filing system and served in the following manner to the below addresses:

Electronically Using EPA OALJ e-filing system:

Eurika Durr, Clerk of the Board
U.S. Environmental Protection Agency
Environmental Appeals Board
WJC East, Room 3332
1201 Constitution Avenue, N.W.
Washington, DC 20004
202-233-0122
durr.eurika@epa.gov

By Email :

Kathryn E. Szmuszkovicz
David A. Barker
Daniel A. Eisenberg
Beveridge & Diamond, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
Kes@bdlaw.com
dab@bdlaw.com
dae@bdlaw.com

Counsel for Bayer CropScience

Kenneth D.Morris, Esq. L.L.C.
Law Offices
1320 Vale Drive
West Chester, PA 19382
kdm@kemmorrislaw.com

Counsel for Nichino America, Inc.

Katherine M. Fowler
Sarah B. Mangelsdorf
One South Memorial Drive, 12th Floor
Saint Louis, MO 63102
kfowler@foxgalvin.com
smangelsdorf@foxgalvin.com

Counsel for Amicus Curiae Growers

Kirsten L. Nathanson
Warren U. Lehrenbaum
Jared B. Fish
Preetha Chakrabarti
CROWEL & MORING LLP
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
knathanson@crowell.com
wlehrenbaum@crowell.com
jfish@crowell.com
pchakrabarti@crowell.com

Counsel for Amicus Curiae Croplife America

Stephanie M. Parent
Hannah Connor
Center for Biological Diversity
P.O. Box 11374
Portland, OR 97221
sparent@biologicaldiversity.org
hconnor@biologicaldiversity.org

Counsel for Amicus Curiae Center for Biological Diversity

Ariadne Goerke

Ariadne Goerke