

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

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

**REQUEST FOR ORAL ARGUMENT BY  
BAYER CROPSCIENCE LP AND NICHINO AMERICA, INC.**

Pursuant to 40 C.F.R. § 164.101(c), Bayer CropScience LP and Nichino America, Inc. (collectively, “Appellants”) hereby request that the Environmental Appeals Board (“EAB”) order oral argument in the above-captioned matter.<sup>1</sup>

Oral argument would assist the EAB in its deliberations and resolution of the issues presented by the case for the following reasons. Because of the magnitude and complexity of the rulings being appealed, all of which have been issued quickly in a six-week period, oral argument is necessary to ensure a full and fair airing of the matters in dispute on appeal. Oral argument is particularly important for this hearing, which involves numerous issues of first impression because it is the first hearing held under FIFRA § 6(e), 7 U.S.C. § 136d(e). The hearing also concerns the lawfulness of a unique condition of registration that, if approved, could have significant implications for future pesticide cancellation actions. Finally, oral argument will provide the EAB a critical, final opportunity to address any factual or legal questions before determining whether to uphold preliminary decisions and an Initial Decision issued by the Administrative Law Judge (“ALJ”) that, if permitted to stand, would have complex and far-

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<sup>1</sup> Counsel for Appellants conferred with counsel for Appellee United States Environmental Protection Agency (“EPA”), who indicated that Appellee does not agree with the rationale submitted by Appellants for oral argument and does not believe oral argument is necessary; however, Appellee does not object to oral argument if the EAB determines it will assist them in their deliberations.

reaching implications on the pesticide registration process, registrants, pesticide distributors and retailers, and growers.

## **ARGUMENT**

Oral argument is warranted because Appellants are appealing three decisions rendered by the ALJ, all of which were issued within a span of six weeks and encompass a total of seventy-six single-spaced pages of findings of fact and law. The ALJ's rulings include legal positions and conclusions and interpretations that were not advocated by either party and thus were not briefed before the rulings, as well as a number of key misstatements or misinterpretations of the factual and regulatory history. While Appellants have sought to identify and respond to the most salient facts and legal issues, oral argument on this type of record will provide an opportunity for the EAB to request clarification or elaboration on the points of greatest interest to the EAB. Oral argument should allow the EAB to more quickly understand and narrow the issues and to reach a resolution more efficiently.

Oral argument is particularly valuable in disputes involving issues of first impression. This FIFRA § 6(e) hearing is the first ever of its kind. As a result, every aspect of this dispute is a matter of first impression for the EAB. Even under FIFRA § 6(b) (7 U.S.C. § 136d(b)), there has been only one pesticide cancellation that has proceeded to a cancellation hearing in the last twenty years. *In re Reckitt Benckiser*, FIFRA Dkt. #661. That FIFRA § 6(b) proceeding was resolved by a settlement before it reached the EAB. Adding to the novelty of this dispute, EPA acknowledges that the condition of registration challenged by Appellants is itself unique. *See* June 3, 2016 Corrected Initial Decision (ALJ Dkt. #39) at 11 n.23.

Finally, oral argument is necessary because while the circumstances of this hearing are unique, the decisions issued to date by the ALJ would have far-reaching consequences for FIFRA, its regulated industries, and U.S. agriculture going forward. The precedent that would

be set by an EAB order upholding the ALJ's Order denying Appellants' Motion for Accelerated Decision and upholding the lawfulness of the voluntary cancellation provision would encourage EPA to replicate this type of condition in newly issued pesticide registrations going forward as a means to sidestep the "detailed, multi-step" science-driven process that Congress requires EPA to follow when it makes a risk-based cancellation determination. *Reckitt Benckiser, Inc. v. Jackson*, 762 F. Supp. 2d 34, 42 (D.D.C. 2011).

In upholding the lawfulness of EPA's cancellation decision, the ALJ adopted an extreme position that EPA had not even advocated and which would preclude EPA from ever cancelling a conditional registration under the FIFRA § 6(b) procedure established for risk-based cancellations. The ALJ's Initial Decision upholding EPA's existing stocks determination is similarly and troublingly far-reaching, as it would foreclose any pesticide registrant or affected stakeholder from ever challenging an EPA existing stocks determination for being too prohibitive.

Oral argument will therefore provide the parties and the EAB a critical, last opportunity to clarify the issues in dispute before the EAB renders a final decision that will not only impact future cancellation proceedings, but the pesticide registration process in general.

Dated: June 13, 2016

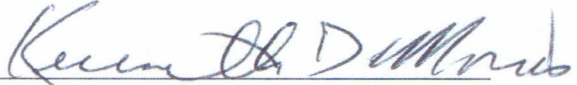
Respectfully Submitted,



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## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 13th day of June, 2016, a true and correct copy of the foregoing Request for Oral Argument by Bayer CropScience LP and Nichino America, Inc. was filed electronically using the EPA EAB eFiling System; and served in the following manner to the below addressees:

### **Electronically Using EPA EAB eFiling System:**

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