

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

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In re: \_\_\_\_\_ )

Bayer CropScience LP, and )  
Nichino America, Inc. )

Docket No. FIFRA-HQ-2016-0001 )

ENVIR. APPEALS BOARD

FIFRA Appeal No. 16-(01)

**BRIEF OF AMICUS CURIAE**  
**AGRICULTURAL RETAILERS ASSOCIATION**  
**IN SUPPORT OF APPELLANTS**

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## **I. INTRODUCTION**

Pursuant to the Environmental Appeals Board's ("EAB") June 9, 2016 Order, The Agricultural Retailers Association ("ARA") files this amicus brief in support of the Appeal Brief of Bayer CropScience LP and Nichino America, Inc. ("Appellants").

The Administrative Law Judge's ("ALJ") rulings improperly barred Appellants from presenting substantive evidence challenging the Environmental Protection Agency's ("EPA" or "the Agency") cancellation determination and existing stocks provisions, while excusing EPA from any obligations to provide transparency or opportunity for review of regulatory actions affecting numerous stakeholders' rights and interests, including the members of the ARA and its customers. Unless the ALJ's rulings are reversed and EPA's cancellation and existing stocks determinations are rejected, not only will flubendiamide be cancelled based upon a scientifically unsound risk-benefit determination, but EPA will be enabled to shield additional, future pesticide cancellation determinations from independent scientific, administrative, or judicial review, depriving ARA member companies of the ability to meet the needs of their customers for effective and reliable pesticide products. ARA is further concerned that the ALJ's rulings, if permitted to stand, will enable EPA to issue prohibitive existing stocks determinations without (1) seeking any input from retailers and distributors, (2) taking into account the economic impact of the determinations on these companies, or (3) providing a means to contest EPA's determinations and avert immediate and significant harm to their businesses.

## **II. INTERESTS OF ARA**

The ARA is a national, non-profit trade organization for agricultural retailers and distributors of agronomic crop inputs with members covering virtually all of the 50 states and representing over 70% of all crop input materials sold to America's farmers. These inputs are used to nourish and protect a wide variety of crops, from major row crop commodities to

specialty crops. Members not only sell agronomic crop inputs but actually apply with their own equipment basic crop nutrients and crop protection products; over half of ARA's members' commercially apply pesticides and fertilizers for their customers on about 45% of their total acres served. ARA membership is diverse, from small family-run businesses of 10 employees to farmer cooperatives with one thousand or more employees and large corporations with thousands of employees and multiple branches. Suppliers of the products sold by retailers are also members of the association. ARA members are trusted resources for their farmer customers concerning products and techniques needed to produce crops which also help to preserve and protect the crops, the soil, and the environment. ARA members have been instrumental in educating their farmer customers as to the benefits of no-till, limited till, and conservation tillage, technologies which in turn produce less runoff of nutrients and pesticides.

Flubendiamide is currently registered and sold by ARA members for use on more than 200 crops in the U.S. ARA members would be adversely affected by flubendiamide's cancellation and a prohibition on sale or distribution of existing stocks. If the ALJ's Initial Decision stands, ARA members may also be deprived of their statutory right to contest cancellations and overly stringent existing stocks determinations going forward.

### **III. STANDARD OF REVIEW**

Appeals to the EAB are reviewed *de novo*. 40 C.F.R. § 22.30(f) (The EAB "shall adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed."). The EAB applies the "preponderance of the evidence" standard established by 40 C.F.R. § 22.24(b). *See In re The Bullen Cos.*, 9 E.A.D. 620, 632 (EAB 2001).

#### **IV. ARGUMENT**

On March 1, 2016, EPA issued a Notice of Intent to Cancel all registered flubendiamide products, which included a proposed existing stocks determination that would prohibit all sale or distribution of flubendiamide products beginning on the cancellation date. ARA is concerned that EPA based its cancellation determination on unsound science and that it failed to consider the economic harm of cancellation and its existing stocks determination on pesticide distributors and retailers. ARA is further troubled by the ALJ's holding in her Initial Decision that these companies have no cause of action or remedy when EPA determines to prohibit all sale or distribution of existing stocks.

##### **A. EPA's Scientifically Unsound Cancellation Determination Should Be Subject to Independent Review.**

ARA strongly disagrees with EPA's cancellation determination and is concerned that the loss of flubendiamide products would have a major adverse economic and agronomic impact on its members and their farmer customers who have come to rely on flubendiamide registered products as critical tools in their pest management programs. Like Appellants, ARA is concerned that EPA is ignoring real-world data in favor of flawed theoretical modeling to cancel a product with many benefits for agriculture and the environment. As Appellants' evidence has demonstrated, real-world data from monitoring that has taken place over the last 7 years shows that flubendiamide and its degradate remain well below levels of concern. EPA's conduct with respect to flubendiamide is a departure from EPA's past practice, which has emphasized the transparent application of sound science to ensure product safety and encourage innovations within the agricultural crop protection industry. Here, EPA has acted without transparency, suddenly adopting new toxicity assumptions and basing its cancellation determination on exposure assumptions for residues of flubendiamide that rely on theoretical modeling rather than

hard scientific data. If the EAB does not intercede, EPA will cancel a product that ARA member company customers have found to be an effective and safe tool to control pests and maximize crop yields since its introduction into the market.

The Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. §§ 136-136y, is intended to ensure that growers have access to the best and safest tools for managing crop pests. This purpose is best served by ensuring that when EPA makes a risk-based cancellation decision, it does so transparently, based on all relevant data and information, and subject to independent scientific review. ARA respectfully requests that the EAB order EPA to follow the FIFRA § 6(b), 7 U.S.C. § 136d(b), cancellation process if the Agency continues to believe that flubendiamide must be cancelled. Doing so would allow an opportunity for stakeholders such as ARA members and their grower and applicator customers to provide information regarding the benefits of flubendiamide to the agricultural economy. The § 6(b) process would also allow for independent scientific review of EPA’s cancellation determination, which is critical given the many flaws that Appellants have identified in EPA’s analysis.

**B. Retailers and Distributors Should Not Be Prohibited from Selling Existing Stocks of Flubendiamide Without Being Provided Any Opportunity to Provide Input or to Contest That Determination.**

ARA also strongly disagrees with EPA’s existing stocks determination, and specifically the prohibition on any further sale or distribution of flubendiamide products. ARA is particularly troubled by the ALJ’s determination that stakeholders such as ARA have no cause of action or remedy to challenge a restrictive existing stocks determination. Corrected Initial Decision (ALJ Dkt. #39) at 35. ARA believes the EPA decision to not follow its ordinary “release for shipment” procedures is punitive in nature and significantly more restrictive than virtually all previous decisions by the Agency.

EPA's existing stocks determination is properly reviewable and should be overturned. ARA is concerned by the ALJ's holding in the Initial Decision that there is not "*any* cause of action or remedies . . . where the Administrator has not made a determination to allow the continued distribution, sale, and use of existing stocks." *Id.* at 35. If this aspect of the ALJ's decision is allowed to stand, it will effectively eliminate the ARA members' ability to contest an existing stocks determination. The FIFRA § 6(e), 7 U.S.C. § 136d(e), hearing process is expressly intended to give registrants and other impacted stakeholders an opportunity to contest existing stocks determinations that are inconsistent with the purpose of FIFRA. Here, EPA has unlawfully failed to take into account the impacts of its determination on the companies that sell and distribute flubendiamide and the growers who depend upon the product. Indeed, EPA has failed to conduct any risk-benefit analysis at all to justify its prohibition on such sale or distribution. The ARA respectfully requests that the EAB correct the ALJ's statements and confirm that pesticide retailers and distributors have the statutory right to contest EPA's existing stocks determinations that directly affect their interests, whether those determinations are permissive or prohibitive.

EPA's change in approach for this proposed cancellation is an unwarranted departure from decades of past practice, and will exacerbate the regulatory uncertainty, risks, and costs already faced by agricultural retailers and distributors. The same reasoning that led EPA to permit growers to use existing stocks should have dictated permitting third-party distributors and retailers to sell existing stocks. EPA bases its existing stocks determination on the need to deter registrants from failing to comply with conditions of registration. *See, e.g.*, RE 10 at 200108; Corrected Hearing Tr. (ALJ Dkt. #32) 56:8-22. EPA has not alleged any conduct by pesticide distributors and retailers that warrant "punishment," yet its existing stocks determination would



punish these companies by prohibiting their sale or distribution of flubendiamide products that they have already purchased. EPA further acknowledges that in making this unusually prohibitive determination, the Agency is departing from the existing stocks policy that ordinarily guides its decision-making. EPA's Post-Hearing Brief (ALJ Dkt. # 35) at 11-12. In doing so, EPA never considered the extent to which its existing stocks determination will harm the companies that sell and distribute flubendiamide. ARA members would be economically impacted more severely than end-users as they have higher quantities of flubendiamide pesticide products in their storage and "the costs and risks associated with collecting them for disposal would be high" compared to its sale to end-user customers for "use of the cancelled product in accordance with its labeling." PBNX 20 at PBN0104. Not following customary "release for shipment" procedures will also likely increase the need for FIFRA § 18, 7 U.S.C. § 136p, labels should emergencies arise, and divert scarce financial resources of both state agencies and EPA from other priorities to that purpose.

In place of EPA's proposed existing stocks determination, the EAB should instead enter an existing stocks determination that follows customary "release for shipment" procedures, which allow for the legal sale and use of existing stocks in the supply chain.

## **V. CONCLUSION**

For the reasons stated above, the EAB should reverse the ALJ's rulings, reopen the hearing to admit all relevant evidence that the ALJ excluded, deny the proposed cancellation of the flubendiamide registrations and related existing stocks determination, and require EPA to follow the cancellation process outlined under FIFRA § 6(b) based upon its "unreasonable adverse effects" determination if the Agency wishes to pursue cancellation.

Dated: June 20, 2016

Respectfully Submitted,

A handwritten signature in black ink, reading "Richard D. Gupton". The signature is written in a cursive style and is positioned above a horizontal line.

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**STATEMENT OF COMPLIANCE WITH WORD LIMITATION**

I hereby certify that this Brief of Amicus Curiae Agricultural Retailers Association, including all relevant portions, contains fewer than 14,000 words.

  
Richard Gupton

## CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 20th day of June, 2016, the original and 4 copies of the foregoing Brief of Amicus Curiae Agricultural Retailers Association in Support of Appellants were hand delivered to the Clerk of the Board at the address listed below; and served in the following manner to the below addressees:

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