

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

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-Appellants)
)
Dkt No. FIFRA-HQ-2022-0002)

**MOTION FOR LEAVE TO FILE REPLY BRIEF
AND FOR ORAL ARGUMENT
AND
PROPOSED REPLY BRIEF**

Petitioner-Appellant AMVAC Chemical Corporation (“AMVAC”) moves for leave to file the attached Reply Brief. The Board should consider the Reply Brief in this novel and important case for the reasons set forth below. In sum, the Reply Brief concisely explains how the Office of Pesticide Program’s (“OPP’s”) response brief (“Resp. Br.”) shifts position on several central issues and, by doing so, simplifies the Board’s review of AMVAC’s appeal of the grant of OPP’s Motion for Accelerated Decision (“MAD”). The first is OPP’s concession that AMVAC’s interpretation of the legal standard for suspending a registration in the statute is “permissible.” The second is OPP’s failure to respond (at all) to AMVAC’s argument that the ALJ improperly deferred to OPP for purposes of resolving a summary motion. *See* AMVAC Appeal Br. at 27-30. While OPP had argued in its MAD, at 41, that OPP is the “sole authority” concerning whether a registrant’s response to a Data Call-In was appropriate, OPP’s only response to AMVAC’s argument that the ALJ improperly deferred is to argue that OPP may prevail even absent any deference.

Even prior to these shifts, the correct decision for this Board on *de novo* review was to remand this matter for a hearing on all data requirements because AMVAC raised genuine disputes concerning facts material to whether AMVAC acted appropriately with respect to each data requirement at issue (and the existing stocks determination). These factual disputes preclude the grant of the MAD. In its response brief, OPP mischaracterizes the applicable summary motion standard, offers its own assessment of selected facts in dispute, and misconstrues certain statements in AMVAC’s brief in a final attempt to support the suspension of AMVAC’s registration without a remand for a hearing.

AMVAC’s proposed Reply Brief addresses OPP’s shifts of position, corrects OPP’s mischaracterizations of certain facts and law in AMVAC’s appeal brief, and addresses OPP’s

improper introduction of an exhibit with its brief that was not before the ALJ.

Finally, to assist the EAB in confirming that material issues remain in dispute, the Reply Brief is submitted with a table, attached as **Exhibit A** thereto, which references the pages in the parties' pleadings (and the ALJ's Order) that discuss each data requirement at issue, and the existing stocks determination.

AMVAC filed its appeal brief on July 21, 2022, as did the group of growers identified in the caption (the "Grower Petitioners"). OPP filed its Resp. Br. on July 28, 2022. CropLife America filed an amicus brief in support of AMVAC and the Grower Petitioners on July 28, 2022 as well.

Neither the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136-136y, nor the regulations governing this proceeding, 40 C.F.R. Subchapter E, Subpart B, nor the EAB's July 8, 2022, Order Governing Procedures for Registration-Related Appeals Under [FIFRA], address the procedure for requesting a Reply Brief in appeals of accelerated decisions in proceedings under 7 U.S.C. § 136a(c)(2)(B)(iv) (the "Suspension Provision").

The EAB should, in its discretion, permit AMVAC to file the attached proposed Reply Brief. Good cause exists to permit the filing for the reasons explained below.

- First, the legal standard governing OPP's authority to suspend pesticide registrations under the Suspension Provision has not previously been addressed by the EAB, and so this matter presents a question of first impression for the Board.
- Second, the resolution of this matter is of profound importance beyond the parties involved given the large number of other pesticide registrants that are currently responding to Data-Call Ins of the same type that OPP alleges AMVAC has not satisfactorily responded to.

- Third, OPP's response brief contains several mischaracterizations of fact, law, and AMVAC's own statements to which AMVAC should be afforded an opportunity to respond. These include: (1) advocating a material misapplication of the standard for evaluating motions for accelerated decision (the critical legal standard for the EAB's current deliberation); (2) misrepresenting the contents of a central document (EPA's October 2020 letter to AMVAC, JX 21); and (3) erroneously suggesting that AMVAC asserted the EAB's options for adjudicating this matter are limited in a manner that they are not.
- Fourth, OPP has submitted new evidence with its appeal brief (its exhibit RX 10) that was not contained in its prehearing exchange and thus was not before the ALJ. AMVAC responds to this improper new evidence in the proposed Reply Brief
- Finally, to facilitate the EAB's review, AMVAC provides with its proposed Reply Brief a cross reference table (**Exhibit A** to the proposed Reply Brief) that shows where each individual data requirement is discussed in materials previously submitted by AMVAC, the Grower Petitioners, and OPP, as well as in the ALJ's Order.

For the foregoing reasons, AMVAC asks the EAB to accept and consider the attached Reply Brief. Based on the same considerations, AMVAC believes that oral argument would be appropriate and will make itself available at the EAB's convenience.

The Grower Petitioners do not object to the filing of AMVAC's Reply Brief or to oral argument. OPP opposes consideration of AMVAC's Reply Brief and opposes oral argument.

Date: August 2, 2022

Respectfully Submitted,

/s/ Hume M. Ross

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CERTIFICATION

I certify that the foregoing **Motion for Leave to File Reply Brief and for Oral Argument** contains 881 words, exclusive of the caption and certifications based on the word count of the word-processing system used to prepare this document.

/s/ Hume M. Ross
Hume M. Ross

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Petitioner AMVAC Chemical Corporation's Motion for Leave to File Reply Brief and for Oral Argument**, the associated proposed **Reply Brief**, and **Exhibit A** to the Reply Brief, were sent on August 2, 2022, to the following parties in the manner indicated below.

/s/ Hume M. Ross

Hume M. Ross

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Dated August 2, 2022