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

In re AMVAC Chemical Corporation; Grower-Shipper Association of Central California; J&D Produce; Ratto Bros., Inc.; and Huntington Farms **Docket No. FIFRA-HQ-2022-02**	)	**Appeal No. FIFRA 23-(01)M**

RENEWED JOINT MOTION FOR ENTRY OF FINAL DECISION

I. BACKGROUND

The United States Environmental Protection Agency, Office of Pesticide Programs ("OPP"), AMVAC Chemical Corporation ("AMVAC"), and the Grower-Shipper Association of Central California; J&D Produce; Ratto Bros., Inc.; and Huntington Farms (the "Grower Petitioners") (collectively, the "Parties,") hereby jointly renew their request that the Environmental Appeals Board ("Board") enter a Final Decision and Order incorporating the terms of a settlement agreement reached between AMVAC and OPP following the filing of the Initial Decision in this matter. A copy of the agreement has been filed with the Board. EAB Dkt. 4, Att. 1 (the "Settlement Agreement"). Entry of the Settlement Agreement will avoid further expenditure of resources and time litigating an appeal before the Board and will provide clarity concerning the framework under which the registration at issue may be re-instated.

The Parties initially moved for entry of a Final Decision incorporating the Settlement Agreement on June 16, 2023. On June 22, 2023, the Board denied that motion without prejudice and allowed the Parties to file a renewed motion no later than June 27, 2023, provided that the renewed motion address five questions posed by the Board in its June 22, 2023, Order.

This joint filing responds to the Board's inquiries and renews the Parties' request for

entry of the Settlement Agreement. As discussed in more detail below, under the current procedural posture of this case, the Board possesses the authority to enter the Settlement Agreement and retain jurisdiction to alter its Final Order if AMVAC or OPP fails to meet their respective obligations under the Settlement Agreement.

First, the timing requirements and provisions related to the filing of exceptions in 40 C.F.R. Part 164, Subpart B, are correctly viewed as claim processing rules rather than restrictions on the Board's ability to provide the requested relief. They provide no restriction on the Board's ability to act where the Parties jointly request entry of an agreement to avoid further litigation.

Second, the Board may retain jurisdiction to modify its Final Order as appropriate to enforce the Settlement Agreement because it has authority, in no way limited by the relevant delegation, to act as the final decision maker in this matter. The rules explicitly provide that the Board may later modify a Final Order, which is sufficient to enforce the Settlement Agreement.

Third, the Parties' request that the Board "enforce" the obligations of AMVAC and OPP under the agreement does not extend to potential enforcement activity under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") Section 12 that would implicate delegations to other departments of the Agency or contravene requirements of Section 14 related to notice and hearings in connection with alleged violations.

Fourth, potential disputes that the Board might be called upon to resolve would be limited in number and scope, and would require fact-finding of the same character as the Board is empowered to perform, and necessarily does perform when ruling on certain motions. Notwithstanding that, as discussed in more detail below, the Parties would be amenable to factual disputes being referred to the ALJ or a mediator for resolution prior to final action by the Board.

Fifth and finally, the requested relief does not require the Board to act inconsistently with any precedent; the statutory scheme and procedural posture of the current matter are distinguishable from a prior matter in which the Board declined to retain jurisdiction.

As also developed within the responses to the Board's questions, below, there are no policy considerations that prevent the Board from retaining jurisdiction. On the contrary, a finding by the Board that it lacked the ability to enter and enforce the Settlement Agreement would create a paradoxical outcome in which EPA's administrative tribunals would only possess the ability to implement dispute resolution at certain points of a suspension proceeding under 7 U.S.C. § 136a(c)(2)(b)(iv) (the "Suspension Provision") (i.e., prior to an initial decision), but not at other later stages. Neither FIFRA, the 40 C.F.R. Part 164 regulations governing the conduct of this proceeding, nor any restriction imposed by the Agency's internal delegation documents require this result.

II. RESPONSE TO THE JUNE 22 ORDER'S QUESTIONS

The Board's June 22 Order required that any renewed motion for entry of the Settlement Agreement address five enumerated questions. This section answers those questions in the order they were presented by the Board.

A. Question 1: *Legal Basis for Final Decision and Order: Explain what the legal basis is for the Board to issue a Final Decision and Order prior to the filing of any exceptions pursuant to 40 C.F.R. § 164.101(a).*

The Board may issue a Final Decision and Order in response to a properly supported motion, following an initial decision, even where exceptions have not yet been filed under 40 C.F.R. § 164.101(a). This provision governs the timing of exceptions and is a claim processing rule that does not limit the Board's adjudicatory authority. As such, the timing element of the provision may be waived by the parties and the Board in appropriate circumstances. *Cf. League of United Latin Am. Citizens v. Wheeler*, 899 F.3d 814, 821 (9th Cir. 2018) (discussing Supreme

Court test to distinguish jurisdictional restrictions from waivable claim processing rules). This matter presents appropriate circumstances for waiving the requirement. Waiting for the time for filing exceptions to run (and related notification from the OALJ) would serve no purpose because here all Parties seek entry of a Final Order without the filing of exceptions. Likewise, requiring the filing of pro forma exceptions to trigger the Board's adjudicatory authority in circumstances such as those presented here is not required by FIFRA or Part 164, and would exalt form over substance.

The Board's adjudicatory authority to act as the final decision maker is not in question. The Board possesses unqualified delegated authority to "serve as the final decision maker in all administrative proceedings under … [FIFRA]." Delegation of Authority 1-38A, Administrative Proceedings (Apr. 14, 2015).[1] The structure of 40 C.F.R. Part 164, Subpart B, establishes that adjudicatory authority passed to the Board upon the filing of the initial decision. 40 C.F.R. § 164.60 ("The [Board] shall rule upon all motions filed after the filing of the initial or accelerated decision."). The Board therefore possesses authority to enter a Final Decision unless its adjudicatory authority is impaired by a jurisdictional provision of FIFRA or the Part 164 regulations. But no such impairment is present.

The language of 40 C.F.R. § 164.90(a) does not restrict the Board's ability to act in the absence of filed exceptions, it merely establishes a claim processing rule governing the time in which exceptions must be filed (absent enlargement of time under 40 C.F.R. § 164.6). Likewise, 40 C.F.R. §§ 164.90(b) and 164.101(b) establish claim processing rules governing how an initial decision becomes a final decision when no exceptions are filed. These claim processing rules ensure orderly functioning of agency departments by ensuring that the Board is notified of

[1] The delegation indicates that there are no "[l]imitations" on the delegated authority.

failures to file exceptions and has the option to nonetheless review an initial decision if it chooses to do so (40 C.F.R. § 164.101(b)). Although neither the preamble to the original version of the rules, 38 Fed. Reg. 19,371 (July 20, 1973), nor to the modifications integrating the Board into the process, 57 Fed. Reg. 5320 (Feb. 13, 1992), provide a rationale for the 30 days that ordinarily must elapse before the Administrator (and now the Board) is advised that no exceptions were filed, the 30-day period was almost certainly intended to ensure that no timely postmarked appeals were received after the 20-day period in which they had to be postmarked.[2] The 30-day period, and subsequent notification from the OALJ, serves only to ensure that the Board will not begin to consider whether to review an initial decision (or more problematically, cause a decision to become final) while a timely appeal is "in the mail." As noted above, this timing restriction is meaningless in a posture in which the Parties present a Settlement Agreement to the Board and there is no reason why the Board cannot act on this Motion notwithstanding that no exceptions have been filed.

Likewise, a requirement that pro forma or limited exceptions be filed prior to entering the Settlement Agreement here would serve no purpose. Under Subpart 164, the scope of the final order that the Board may issue does not depend on the content of exceptions filed by the parties. *See* 40 C.F.R. § 164.103 (stating that the Board's "final order may accept or reject all or part of the initial or accelerated decision … even if acceptable to the parties"). While the Board may choose to employ issue waiver principles and not consider an argument not raised by a party in

[2] *Cf.* 40 C.F.R. § 164.5 ("If filing is accomplished by mail addressed to the clerk, filing shall be deemed timely if the papers are postmarked on the due date except as to initial filings requesting a public hearing or responding to a notice of intent to hold a hearing, in which case such filings must be received by the hearing clerk either within the time required by statute or by the notice of intent to hold a hearing.") Exceptions to an initial decision would thus be timely if postmarked on the 20th day after the initial decision.

exceptions in a contested case, this is likewise a juridical device to ensure efficiency and due process, it is not a limit on the Board's adjudicatory capacity as 40 C.F.R. § 164.103 makes clear. There is no substantive need to require the filing of exceptions where the Parties jointly request entry of a Settlement Agreement to avoid the unnecessary expenditure of time and resources on further litigation, as here.

B. Question 2: *Legal Basis for Continuing Jurisdiction: Explain why the Board has the authority to retain jurisdiction to enforce the Settlement Agreement and adjudicate disputes in accordance with FIFRA and 40 C.F.R. Part 164.*

As discussed in response to the Board's first question, the beginning point in the analysis is that the Board possesses unqualified delegated authority to "serve as the final decision maker in all administrative proceedings under … [FIFRA]." Delegation of Authority 1-38A, Administrative Proceedings (Apr. 14, 2015). Regarding retention of jurisdiction and adjudication of disputes, the question then becomes, is there any provision of FIFRA, Subpart B, or a relevant delegation that restricts the Board from retaining jurisdiction and adjudicating disputes arising under a Settlement Agreement? Or, put another way, is there any reason that the Board does not possess: (1) the ability to modify its Final Order if AMVAC or OPP does not perform an obligation under the Final Order; or (2) the ability to determine whether a Party failed to meet its obligations so that it could appropriately modify the Final Order. The second prong of this analysis implicates Question 4 in the Board's Order and so is discussed below in response to that question. The remainder of the response to Question 2 relates to the first prong—may the Board later modify a Final Order if it finds cause to do so?

Based on Subpart B, the Board retains the authority to modify Final Orders after they are entered. *See* 40 C.F.R. § 164.110(c) (permitting the filing of motions to reconsider Final Orders). Although Subpart B contemplates that such motions ordinarily be filed within 10 days after the service of the Final Order, *id.*, the Board has the authority to, on motion, extend this

period of time.[3] 40 C.F.R. § 164.6(b). The Parties thus submit that a motion to enforce the Settlement Agreement fits within the rubric of 40 C.F.R. § 164.110 as it would be a request that the Board find that the Final Order entering the Settlement Agreement was "erroneous" insofar as the Settlement Agreement was premised on a Party timely taking a particular action which that Party then timely failed to take and alter its Final Order accordingly. The Parties accordingly ask that the Board, if it proceeds to enter a Final Order consistent with the Parties' request, also prospectively extend the time for filing motions to modify the Final Order until such time as OPP reinstates AMVAC's registration consistent with the Settlement Agreement, at which point the Parties will notify the Board of this occurrence.

Looking more broadly than the procedural rules in Subpart B, as the Board has jurisdiction to enter a Final Order in the first instance, it also has jurisdiction also to enforce its Final Order, consistent with precedent in the Federal Courts. *See Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994) (holding that Federal Courts may, if they incorporate the terms of a Settlement Agreement in a final order, retain jurisdiction to enforce the settlement if the parties agree). This ability is necessary for the Board to manage its proceedings and vindicate its authority.

Additionally, it would be an odd result if ALJs could enter and enforce consent decrees in Notice of Intent to Suspend cases but the Board could not. In *In the Matter of Oakite Products, Inc.*, FIFRA Data Docket No. 208, 1995 WL 129864 (Jan. 4, 1995), ALJ Head entered an Accelerated Decision incorporating the terms of a settlement agreement reached between the Petitioner, Oakite Inc., and the pesticide program office of EPA to resolve a NOITS issued under

[3] With this and other motions authorized to be made to the Board under the Subpart B rules, the Board necessarily must assess and answer questions of fact to decide the motion, as discussed in more detail in response to Question 4.

the FIFRA Reregistration Program. That settlement agreement provided a schedule for submittal of studies and permitted the program office to obtain a suspension order on subsequent application to the ALJ's office if the registrant did not timely submit the studies. The agreement left open the possibility that Oakite Inc. might find grounds to object to EPA's later motion for suspension, thus requiring further action on the part of the ALJ. In any event, *Oakite* clearly represents a retention of jurisdiction by the OALJ to implement a settlement agreement related to a NOITS, including provisions for later action by the ALJ depending on the conduct of the Parties; there is no reason to conclude that the Board possesses lesser authority.

C. Question 3: *Enforcement of the Settlement Agreement: Explain the legal basis and authority for the Board to enforce the settlement agreement and how this would comport with the Environmental Protection Agency's delegations of authority for enforcement of the FIFRA. See, e.g., U.S. Environmental Protection Agency, Delegations Manual, Delegation 5-14. The proposed Final Decision and Order states that "[t]his order shall be enforceable under section 12(a)(2)(J) of FIFRA," which provides that a violation of a suspension order is unlawful. Pursuant to section 14 of FIFRA, such a violation is subject to civil penalties following notice and an opportunity for a hearing or criminal penalties assessed by a court. 7 U.S.C. § 136l.*

The Parties do not intend for the Board to retain jurisdiction to adjudicate claims that AMVAC violated the suspension order by, *e.g.*, distributing or selling EPA Reg. No. 5481-495 while its registration is suspended. The Parties anticipate that any such allegation would be made and adjudicated, as it would be in the absence of the Settlement Agreement, through the normal process for pursuing enforcement of violations under FIFRA via the Office of Enforcement and Compliance Assurance, in compliance with Delegation 5-14.

The Parties anticipate that there would be only two scenarios which would lead to a request that the Board to enforce the terms of the Settlement Agreement.[4] The first scenario

[4] The Parties do not intend to waive any other potential grounds for enforcement, however, the two examples provided are the only scenarios which appear reasonable. If AMVAC fails to submit one or more studies entirely (or by the expected due date) the product will merely remain suspended for a longer duration. OPP would not need to seek enforcement of the Settlement Agreement in that scenario.

would arise if AMVAC submitted all the required reports and all the reports were declared or deemed to satisfy the requirements consistent with Section IV of the Settlement Agreement, but OPP did not timely reinstate AMVAC's registration pursuant to its obligations under Section VI.A. of the Settlement Agreement. In this instance, AMVAC would move the Board for relief from the Final Order, seeking to have the Final Order modified or rescinded such that its registration was no longer suspended. The Board would have to confirm that AMVAC had in fact submitted the studies (7 in total) and that, for each of them, OPP had notified AMVAC that it was acceptable or that the period of time stated in Sections VI.A or VI.D.2. of the Settlement Agreement had elapsed with no response from OPP. The facts necessary to establish, or refute, that this had occurred could be provided by declaration.

In the second scenario, AMVAC would have submitted all the reports; OPP would have notified AMVAC that, for one or more of them, the report (and any additional information OPP might request pursuant to Section IV.C. of the Settlement Agreement) does not establish that the data was generated in "substantial accordance with applicable requirements of the DCI" as defined in the Settlement Agreement, and AMVAC would dispute OPP's determination. In this scenario, the Board would have to evaluate OPP's assertion that "deviations from the OCSPP Guidelines or protocols, or other issues affect the scientific validity of submitted data." Settlement Agreement, Section I.A.4. The facts necessary to establish, or refute, that this had occurred also could be provided by declaration.[5]

Neither of these scenarios implicate enforcement activity covered by Delegation 5-14 and, as such, there is no conflict between the request for potential resolution of these disputes and Delegation 5-14 or any other provision of FIFRA.

[5] Practical issues related to dispute resolution are addressed in response to Question 4.

D. Question 4: *Resolution of Disputes: Explain the legal authority for the Board to resolve disputes arising under the Settlement Agreement, and how the Board would resolve disputes arising under the Settlement Agreement, particularly those involving questions of fact, in accordance with 40 C.F.R. Part 164. Include in this response an explanation as to why it is appropriate for the EAB to resolve disputes concerning the outstanding studies before those disputes have been heard by an Administrative Law Judge. Finally, explain what standard of review would apply to the Board's review of any such disputes.*

The Parties' response to Question 2 addresses "why the Board has the authority to retain jurisdiction to enforce the Settlement Agreement and adjudicate disputes." The response to Question 4 focuses on "how the Board would resolve disputes arising under the Settlement Agreement, particularly those involving questions of fact" and the related elements of the Question.

The Board, in the ordinary exercise of the resolution of motions, receives, weighs, and applies facts provided by parties either through attorney argument or declarations. The Board routinely considers, and rules on, inter alia, motions: for extensions of time; to file amicus briefs; for stays to permit settlement discussions;[6] to permit interlocutory review of ALJ orders;[7] and to amend settlement agreements previously entered by Final Orders of the Board.[8] The Board also routinely holds oral argument during which it questions counsel concerning the content and import of documents in the record before it.[9]

The degree of fact-finding that would be required to resolve either of the two foreseeable scenarios discussed in Question 3 is not out of character with the degree of fact-finding inherent

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[6] *In re City of Ruidoso Downs and Village of Ruidoso WWTP*, NPDES Appeal No. 17-03, Order Staying Appeal and Rescheduling Oral Argument (May 2, 2018).
[7] *In re FIFRA Section 6(b) Notice of Intent to Cancel Pesticide Registrations for Chlorpyrifos Products*, FIFRA Appeal No. 23-02, Petitioners' Motion for Appeal of Order Denying Stay to Environmental Appeals Board (June 1, 2023).
[8] *In re E.I. du Pont de Nemours and Company*, Docket Nos. TSCA-HQ-2004-0016, RCRA-HQ-2004-00016, TSCA-HQ-2005-5001, Order Granting Motion to Amend Settlement Agreement (Jan. 8, 2009).
[9] *E.g.*, *In re Veolia ES Technical Solutions, LLC*, CAA Appeal No. 19-01, Oral Argument Transcript (Apr. 14, 2020).

in the resolution of the types of motions discussed above. Scenario 1 (OPP fails to timely reinstate following notification of acceptance of (or failure to notify of non-objection to) the reports submitted by AMVAC) requires no more than establishing the relevant dates and lack of communications. Scenario 2 (OPP and AMVAC disagree whether a submitted study is in "substantial accordance with applicable requirements of the DCI") requires weighing of additional facts, but still can be resolved by reference to the relevant submitted document(s) and through a declaration from AMVAC (and counter-declaration from OPP) concerning the deviation or deficiency alleged by OPP. There is no regulatory requirement that these questions of fact be considered in the first instance by an ALJ, just as there is no requirement that the Board refer all questions of fact subsidiary to decisions on the types of motions noted above to an ALJ for consideration in the first instance.

Nonetheless, the Parties would not object to the Board referring any subsidiary factual disputes that it was unwilling or unable to resolve to either the OALJ or a Board-appointed ADR mediator, provided such third party could resolve the factual dispute on an expedited basis. The Parties would consider such referral, provided that the matter was then returned to the Board for modification of the Final Order, if appropriate, to be within the scope of the previously executed Settlement Agreement stating that the Board "shall retain jurisdiction to enforce this Settlement Agreement and to adjudicate any disputes between AMVAC and OPP arising under it, and AMVAC and OPP agree not to challenge such exercise of jurisdiction." Settlement Agreement, Section VI.A. However, the Parties also are willing to amend the Agreement to explicitly consent to such referral to the ALJ or the Board-appointed ADR mediator for dispute resolution if the Board so requires.

Regarding the standard of review, the Parties anticipate the Board would review any disputes as it would under a *de novo* review standard, which would be the standard applied if the Board were substantively reviewing the Initial Decision. *In re AMVAC Chemical Corporation*, 18 E.A.D. 769, 779, 2022 WL 13908249, at *8 (Sept. 29, 2022) (citing *In re Bayer Cropscience LP and Nichino America, Inc.*, 17 E.A.D. 228, 2016 WL 4125892 (Jul. 29, 2016)). Accordingly, the Parties believe that the Board could apply this standard to any dispute arising from the Settlement Agreement. The same factual determinations—whether information submitted by AMVAC is in substantial accordance with the requirements of the DCI—that the Board would presumably review after the filing of a notice of exception would also be at the heart of any dispute arising from the Settlement Agreement. In any dispute resolution exercise, whether administered by the Board, the ALJ, or a mediator, it is the Parties' intent that a preponderance of the evidence standard would be applied. *Cf. In re AMVAC*, 18 E.A.D. at 792-93.

E. Question 5: *Consistency with Precedent: Explain how the Settlement Agreement is consistent with the Board's decision in In re Arizona Municipal Storm Water NPDES Permits for City of Tucson, et al., NPDES Appeal No. 98-5 (EAB Mar. 25, 1999) (Order Dismissing Petition).*

The Parties do not read the *Arizona Municipal* March 25, 1999, Order Dismissing Petition, or the December 22, 1998, Order Dismissing Petition which it cites at 4, as establishing a precedent that the Board cannot or should not retain jurisdiction in the circumstances presented in this case. The situation in *Arizona Municipal* is factually and legally distinguishable to the situation presented here. In *Arizona Municipal*, Petitioners (several Environmental Non-Governmental Organizations ("ENGOs")) reached a Consent Agreement with EPA in the ENGO's challenge of NPDES permits issued to several jurisdictions. The Consent Agreement provided that EPA would adhere to timelines for updating the NPDES permits. March 25, 1999, Order at 3. EPA subsequently requested, and was granted, a remand of the initially challenged permits. *Id.* at 7. The Board declined to keep the matter on its docket, finding that "[b]ecause

the Region has chosen not to defend the permit modifications, instead requesting a voluntary remand, and petitioners (by acceding to a remand) have accepted compliance with the Consent Agreement as an adequate remedy in lieu of the relief sought in their petition, the issues raised in the petition have effectively become moot." As the Board noted in the December 22, 1998 Order, any objection (by the permittees or the ENGOs) to later reissued permits could be raised with the Board through additional, established procedures.

Here, OPP has not rescinded the NOITS, and so the central issue in this matter—whether AMVAC's registration should be suspended—remains live. The structure of the Settlement Agreement is such that it requires further action that only the Board can provide—suspension of the registration—for the remainder of the Settlement Agreement to function, ultimately resolving the issues raised in the NOITS without further litigation.

The settlement here also highlights an important legal distinction between this case and the *Arizona Municipal* case. In *Arizona Municipal*, there was an established pathway for the Petitioners and the permittees to challenge the revised permits once issued. Here there is no established pathway for AMVAC to assert an entitlement to reinstatement. While the Parties agreed that the regulations found in 40 C.F.R. Subpart B should govern this proceeding as they are the most appropriate set of rules in Part 164, the Subpart B rules pre-date the Suspension Provision. *See* 38 Fed. Reg. 19,371 (July 20, 1973) (promulgating Subpart B to "govern[] hearings pursuant to section 6 of [FIFRA]"). The Suspension Provision was added to FIFRA by Pub. L. No. 95-396, 92 Stat. 819, in 1978, and, while it provides that hearings pursuant to hearing requests on NOITS will be conducted under Section 6(d) of FIFRA, the Subpart B regulations were never subsequently amended (except to account for the creation of the Board).

Notably, the Subpart B regulations do not account for a unique feature of the Suspension Provision—the final clause stating that "[a]ny registration suspended under [the Suspension Provision] shall be reinstated by the Administrator if the Administrator determines that the registrant has complied fully with the requirements that served as a basis for the suspension of the registration." Neither Subpart B (nor any other Subpart[10]) contains a regulatory provision that creates an explicit right for a registrant to initiate an administrative proceeding to determine if their suspended registration should be reinstated.[11] This can be harmonized, however, if any subsequent reinstatement action is a continuation of the action in which the registration is suspended. Unlike a NPDES permit appeal, in which a revised permit may bear no resemblance to the initial permit objected to, and thus presents a new question in place of the prior mooted question, the question of reinstatement of a registration will always be closely tied to the analysis of whether the registration should have been suspended in the first place. This is true whether the registration is suspended (and reinstated) pursuant to the base terms of the Suspension Provision, or pursuant to terms agreed in a Settlement Agreement.

In short, the structure of the Suspension Provision supports retention of jurisdiction in a manner that the NPDES regulations do not. Additionally, as a result of the lack of regulations

[10] The regulations in 40 C.F.R. Part 164, Subpart D, have a narrow scope—that is, they apply only to applications for a new registration of a pesticide product that was suspended or cancelled by the Administrator through formal, adversarial proceedings under FIFRA Section 6 and 40 C.F.R. Part 164, Subpart B. Subpart D is not applicable to the lifting of a suspension issued pursuant to FIFRA Section 3(c)(2)(B).

[11] The regulations currently only provide for commencement of an administrative proceeding in response to a suspension notice from the Administrator. *See* 40 C.F.R. 162.20(a) ("A proceeding shall be commenced whenever a hearing is requested by any person adversely affected by a notice of the Administrator of … his intent to … change the classification of a pesticide. A proceeding shall likewise be commenced whenever the Administrator decides to call a hearing to determine whether or not the registration of a pesticide should be canceled or its classification changed.").

written specifically for the Suspension Provision, a refusal by the Board to retain jurisdiction following entry of a Final Order suspending a registration would mean that, potentially, the only recourse for a registrant of a suspended pesticide to obtain judicial review of a refusal by the Administrator to later "determine" that the registration is owed reinstatement would be to resort to the Federal Courts, necessitating further expenditure of government resources. This concern was not present in *Arizona Municipal*. The Board should not be concerned that finding it may retain jurisdiction in cases under the Suspension Provision will require it to do so in other contexts where (as in *Arizona Municipal*) a subsequent administratively challengeable action is guaranteed or (as in enforcement cases) the only substantive term of the agreement is payment of money by the regulated entity which EPA can enforce by other means.

III. REQUESTED RELIEF

Based on the foregoing considerations and responses, the Parties request that the Board enter a Final Decision and Order suspending AMVAC's DCPA Technical Registration subject to the terms of the Settlement Agreement and retain jurisdiction to alter its Final Order and reinstate the suspended registration in a limited scenario in which AMVAC performs its obligations under the Settlement Agreement but OPP does not then timely perform its obligation to reinstate the registration. In connection with this relief, the Parties request that the Board prospectively extend the time for filing motions to modify the Final Order until such time as OPP reinstates AMVAC's registration consistent with the Settlement Agreement, at which point the Parties will notify the Board of this occurrence.

As noted in response to Question 3, the Parties would not object to the Board referring any subsidiary factual disputes that it was unwilling or unable to resolve to either the OALJ or a Board-appointed ADR mediator, provided such third party could resolve the factual dispute on an expedited basis. AMVAC and OPP would consider such referral to be within the scope of the

Settlement Agreement as drafted and agreed but are willing to amend the Settlement Agreement to explicitly consent to such referral for dispute resolution if the Board so requires.

As a first alternative request for relief, if the Board would prefer that the entire Settlement Agreement be entered and overseen by the OALJ as opposed to the Board, the Parties request leave to modify their Settlement Agreement to provide that it will be entered and enforced by the OALJ, following a remand under such terms as the Board may direct.

As a second alternative request for relief, and only if the Board again denies the request for entry of a Final Decision and Order incorporating the Settlement Agreement as requested herein, and also denies the first alternative request for relief, the Parties request that the timing for filing exceptions and other briefs provided in 40 C.F.R. § 164.101(a) be further extended such that any exceptions and appeal briefs would be required to be filed with the Board twenty (20) days after an Order of the Board declining to enter a Final Order incorporating the terms of the Settlement Agreement or to grant the first alternative request for relief.

In connection with requesting this secondary alternative relief from the Board, the Parties jointly stipulate pursuant to 40 C.F.R. § 164.103 to extend the 90-day deadline for the Board to issue its final decision and order, pursuant to that section, by the number of days between the current deadline for exceptions (July 12) and any further extended deadline under the preceding paragraph.

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Dated: June 27, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Renewed Joint Motion for Entry of Final Decision**, dated June 27, 2023, was sent this day to the following parties in the manner indicated below.

/s/ *Hume Ross*
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Counsel for AMVAC Chemical Corp.

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Dated June 27, 2023