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I. SUMMARY

Respondent, the United States Environmental Protection Agency, Office of Chemical Safety and Pollution Prevention, Office of Pesticide Programs (“OPP”), pursuant to 40 C.F.R. § 164.60(b) and the Presiding Officer’s October 26, 2022 Order Shortening Response Time, respectfully submits this motion opposing in part Petitioner AMVAC Chemical Corporation’s (“AMVAC”) Motion for Additional Discovery (“AMVAC Motion”), including the attachments AMVAC’s First Requests for Admission to Respondent (“RFA”) and AMVAC’s First Set of Interrogatories (“INT”) and Document Requests (“RFP”) to Respondent.

II. ARGUMENT

A. Legal Standard

AMVAC correctly notes that 40 C.F.R. § 164.51 provides the legal standard under which the Presiding Officer may permit additional discovery. However, AMVAC fails to demonstrate how most of its discovery requests meet the necessary criteria. Respondent has indicated to AMVAC that OPP would voluntarily comply with requests for discovery that have significant probative value to relevant questions, that would otherwise be not obtainable, and which would not unreasonably delay this proceeding. In section III of this opposition, Respondent indicates which of its objections apply to each of AMVAC’s discovery requests, and which discovery requests OPP intends to voluntarily respond to.

1. Significant Probative Value

Respondent does not dispute that answers to some of AMVAC’s requests could expedite the hearing by eliminating discussion of matters not at issue, although such answers would be of

no probative value to the proceeding.¹ It is not reasonable to interpret 40 C.F.R. § 164.51 as allowing for discovery on any issue whatsoever, regardless of its relevance to the proceeding. The purpose of additional discovery is limited and should only be granted to allow the requester to gather information on questions relevant to the statutory or regulatory basis of the case. As explained below, many of AMVAC's discovery requests seek information that clearly lacks significant probative value as to the question of whether "AMVAC, within the time required by the Administrator, has failed to take appropriate steps to secure the data required" by the DCPA DCI. Remand at 13.

2. Information Not Otherwise Obtainable

Respondent agrees that some of AMVAC's discovery requests seek information from OPP that "is not otherwise obtainable," although much of that information is protected by the deliberative process privilege and/or is not relevant to the questions at issue in this proceeding. Certain other information is publicly available, and Respondent objects to AMVAC's demands that OPP perform the work of gathering and analyzing that data in support of AMVAC's litigation. Respondent indicates in Section III, below, which of AMVAC's discovery requests fail to satisfy the 40 C.F.R. 164.51 criteria for information "not otherwise obtainable," either due

¹ For example, Respondent intends to admit AMVAC's RFAs 25, 27, 31, and 38, which seek admission that certain documents were not provided to AMVAC until approximately March 2017. Respondent has acknowledged this fact in all filings with the Presiding Officer and the Board since the June 17, 2022 pre-hearing exchange. *See, e.g.*, Wentz Statement at 7. Respondent has always maintained that, despite delays in OPP's transmittal of certain documents to AMVAC, the record demonstrates that AMVAC's post-transmittal actions did not constitute appropriate steps to satisfy the DCPA DCI. Additionally, Respondent intends to admit AMVAC's RFA 14, and to answer INT 11 by clarifying that AMVAC submitted an adequate 90-day response (*i.e.*, a plan of action as to how it intended to comply) to the DCPA DCI. Such a claim was not a factual basis for the NOITS, and to Respondent's knowledge, the adequacy of AMVAC's 90-day response has never been at issue in this proceeding or briefed by any of the parties. Respondent clarified to AMVAC that mention of the 90-day response was an error resulting from the NOITS form submitted to the Federal Register. *Compare* JX 1 (copy of NOITS sent directly to AMVAC) *with* JX 2 (copy of NOITS published in Federal Register). AMVAC's Motion seeks to create a controversy where none exists.

to the fact that the information is publicly available, is already included in the record, or has been stated in Respondent's filings to-date.

3. Unreasonable Delay

Although the Presiding Officer must make a finding as to all three criteria of 40 C.F.R. § 164.51 in order to permit additional discovery, in the interest of simplifying the hearing, Respondent has no objection to providing answers to AMVAC's requests, or providing the basis for its objections to those requests, even where the probative value of its answers is minimal, to the extent that doing so would not result in unreasonable delay to the proceeding or an unreasonable burden on Respondent.

However, many of AMVAC's discovery requests are so voluminous that Respondent would be unable to respond within the short time frame provided by the Presiding Officer's October 18 Order. Despite AMVAC's suggestion that only full compliance with its discovery requests is commensurate with OPP's desire to resolve this matter in a timely fashion, Respondent has consistently maintained that resolution of this matter under FIFRA Section 3(c)(2)(B)(iv) should be accomplished as quickly as possible. *Cf.* AMVAC Motion at 7 (citing *In re Dr. Robert Schattner & Sporicidin Int'l*, FIFRA-92-H-02, Order Granting Mot. for Disc. at 12 (EPA ALJ, Sept. 17, 1992)). In contrast to the situation in *Schattner*, wherein a hearing had not yet been scheduled and the information sought concerned the clear factual question of whether an EPA chemical analysis had been performed according to the Agency's guidelines, the instant case provides only one month for close of discovery and the information sought by AMVAC concerns a broad range of irrelevant and/or privileged material, much of which would require a substantial commitment of OPP resources to accomplish. *See, e.g., infra* Sections II.B.3-4.

Additionally, AMVAC's implication that EPA is attempting to use selective disclosure of material helpful to its case while withholding other material is clearly false. As noted in Respondent's Motion to Amend Hearing and Scheduling Order, Respondent believes that the current record, once developed at hearing, constitutes adequate evidence for determining the legal standard for implementing the suspension of AMVAC's DCPA product. The Presiding Officer may determine "whether, within the time required by the Administrator, AMVAC failed to take appropriate steps to secure the data required by the [DCPA DCI]." *See* Remand at 19.

4. Depositions

"[D]epositions are not a routine part of these administrative adjudicatory proceedings and consequently the showing required to justify depositions is substantial." *In re Nova Chemicals, Inc.*, CERCLA-01-0225-0051, Order on Motions (EPA, Aug. 2 2006). "Opposed motions for oral depositions are rarely granted." *In the matter of Chem-Solve, Inc.* RCRA-03-2011-0068, 2012 WL 692916, Corrected Order on Respondents' Motion to Take Dep. Upon Oral Questions at *2 (EPA 2012). In order to justify its need for depositions, AMVAC must make a showing of good cause under 40 C.F.R. § 164.51(b) and must demonstrate that either the information sought cannot be obtained by alternative methods or that there is a substantial reason to believe that relevant and probative evidence may otherwise not be preserved for presentation by a witness at the hearing.

As explained below, AMVAC fails to demonstrate any of the three § 164.51(b) criteria. With respect to good cause, the only questions of probative value that would not invoke OPP's deliberative process privilege concern the narrow matters raised in the parties' competing witness statements, to wit: the "typicality" of AMVAC's strategy of submitting repeated waiver requests and OPP's "course of performance" with respect to extension requests. Furthermore,

AMVAC wholly fails to demonstrate that the information could not be obtained by an alternative method. Indeed, many of its numerous RFAs, INTs, and RFPs concern the exact same topics. The only matters not clearly addressed by AMVAC's other discovery requests are questions targeted at high-level OPP management concerning their factual knowledge and analysis of irrelevant and privileged material. Additionally, as explained below, these same matters can easily be resolved through cross examination of the witnesses scheduled to appear at the hearing, wherein the Presiding Officer will have the opportunity to evaluate the credibility of each based on live testimony.

AMVAC's argument that deposition is proper because OPP reserved the right for several witnesses to testify as experts on rebuttal applies only to three—Wente, Wendel, and Drew—of the seven or more depositions that it seeks to take. Respondent did not seek to offer Bloom as an expert, and does not plan to call as witnesses the other individuals subject to AMVAC's deposition request. To the extent that AMVAC seeks information from these three witnesses, such questions could easily be accomplished through the use of written questions or at the hearing through cross examination. Any questions as to the "bases of [their] opinions" would inherently be limited to "the factual and scientific bases for their statements concerning the scientific merit of AMVAC's waiver requests and data submissions," as those waiver requests and data submissions are explained in Respondent's written filings. *Cf.* AMVAC Motion at 24. Each of the three witness statements and Respondent's prehearing exchange "imparts sufficient information concerning, among other things, the testimony of each proposed witness." *Cf. In re Taotao USA, Inc.*, CAA-HQ-2015-8065, Order on Respondents' Mot. to Take Deps. at 2 (EPA, July 7, 2017). OPP's factual basis for the NOITS has long been apparent; this is not an instance of a party attempting trial-by-surprise.

None of the three witnesses Respondent reserved the right to call as experts on rebuttal are appropriate to provide answers to AMVAC's questions concerning whether OPP could complete a risk assessment without the data required by the DCPA DCI. This court already ruled that "[t]he utility to [OPP] of certain data is not for AMVAC to resolve." Accelerated Decision at 27 (citing *Atochem*, 759 F.Supp. at 864). Nothing in the Remand calls that ruling into question, and AMVAC's attempts to burden Respondent and its witnesses largely for the purpose of probing this inadmissible topic would be inappropriate.

The apparent reason behind AMVAC's request for depositions is simply that Respondent does not intend to call witnesses that AMVAC wishes to cross-examine in furtherance of its theory of selective enforcement and its attempts to distract from the question at hand by broadening the statutory scope of the hearing. AMVAC Motion at 8; *infra* Section II.B.1-2. AMVAC conflates its concern, that the narrow factual basis of OPP's suspension case will not provide an opportunity to develop AMVAC's own desired case through cross-examination, with the issue of evidence preservation.

B. General Objections to AMVAC's Motion

In this section II.B., Respondent discusses several general objections to AMVAC's discovery requests. In Section III, below, Respondent references particular sub-sections of II.B that apply to individual AMVAC RFAs, INTs, RFPs, and deposition topics.

1. AMVAC Attempts to Expand the Hearing Beyond the Narrow Scope Provided in FIFRA Section 3(c)(2)(B)

AMVAC asserts that its requested discovery would "narrow and simplify the hearing." AMVAC Motion at 25. The purpose of its discovery request is clearly the exact opposite, attempting to broaden the scope of the hearing well beyond the relevant statutory question and to

distract the Presiding Officer from AMVAC's own conduct in this matter. Counter to AMVAC's essential position that the Environmental Appeals Board ("Board") remanded this case for deep examination of OPP's actions in administering and enforcing this and unrelated DCIs, both the Presiding Officer and the Board clearly recognize that the primary question to be resolved through this hearing is whether "AMVAC, within the time required by the Administrator, has failed to take appropriate steps to secure the data required" by the DCPA DCI. Remand at 13, October 18 Order at 2-3. AMVAC attempts to label a relatively straightforward question concerning its own conduct as "complex" by obfuscating the "factual basis for the NOITS." AMVAC Motion at 4, 5 n.3.

AMVAC continually focuses on opposing statements from two witness statements submitted by OPP and AMVAC concerning whether the company's actions, taken as a whole, were "abnormally dilatory and repetitive." *See generally*, AMVAC Motion; Notice of Exceptions and Appeal Brief ("AMVAC Appeal") at 33-34 (both comparing Bloom Statement with Gur Statement). Examining the NOITS, which by definition contains the factual basis for its issuance, no mention of the typicality of AMVAC's actions or a comparison to any other registrant or DCI is present. JX 1. The factual basis supporting suspension of AMVAC's DCPA technical product is, and has always been, whether the steps that AMVAC took to secure the data required by the DCPA DCI were appropriate within the context of the registration review of DCPA under FIFRA. *Id.* With respect to at least six² of the DCPA DCI data requirements, Respondent asserts that the factual bases of AMVAC's failure to take appropriate steps to secure the data required by the DCPA DCI are essentially uncontested. Response Brief of Respondent ("Response Brief") at 19-22, 24-32. Resolution of the factual bases for suspension as to these six

² After OPP issued the NOITS, AMVAC submitted two DCPA fish early life-stage studies. OPP continues to diligently review both studies to determine whether each is acceptable to satisfy the requirements of the DCPA DCI.

can be accomplished without examination of “the ‘typicality’ of AMVAC’s conduct[,] the ‘course of performance’ of the parties,”³ or any other genuine issue of material fact discussed by the Board. AMVAC Motion at 1; *see* Remand at 21-23.

The Board found that such competing statements and other genuine issues of material fact precluded the granting of accelerated decision, and ruled that “[a] hearing is necessary to develop an adequate record as to whether AMVAC failed to take appropriate steps to secure the data within the meaning of FIFRA.” Remand at 2. There is no indication in the Remand that the scope of a hearing should be expanded to the degree sought by AMVAC.⁴ Importantly, the Board ruled that the Presiding Officer “must determine whether AMVAC failed to take appropriate steps with respect to each requirement listed in the DCPA NOITS.” Remand at 24 (emphasis added). Respondent posits that the limited purpose of the Remand was to provide AMVAC with a chance to make its case at a hearing and for the Presiding Official to make a requirement-by-requirement determination as to whether AMVAC’s product should be suspended. The purpose was pointedly not to expand the scope of the hearing through voluminous additional discovery in order to resolve minor questions of disputed fact. For the limited number of data requirements still at issue in which questions of the “typicality” of AMVAC’s strategy of submitting multiple waiver requests, the “course of performance” with

³ While the Board’s discussion of “course of performance” was limited to whether OPP requires registrants to submit extension requests, AMVAC incorrectly asserts that the Board required examination of OPP’s “course of performance” with respect to a broad swath of conduct. AMVAC Motion at 10.

⁴ Indeed, the Remand contains numerous indications that the required hearing should be limited to evidence already in the record at the time of the July 1, 2022 Order on Respondent’s Motion for Accelerated Decision. Specifically, the Board notes that the Presiding Officer should: consider the conflicting verified written statements submitted by the parties on June 17, 2022, as part of the initial prehearing exchanges; consider “AMVAC’s waiver requests and the responses thereto”; provide “an opportunity to cross examine the witnesses who provided conflicting statements”; and “evaluate[] the credibility of those witness based on live testimony.” Remand at 22-23. In some respects, the Board specifically narrowed the scope of issues appropriate for resolution at the hearing. For instance, the Board agreed with Respondent that the legality of the 2013 DCI and the necessity of the data required by that document “is not at issue in this proceeding.” *Id.* at 23 (citing *Atochem N. Am., Inc. v. EPA*, 759 F. Supp. 861, 864 (D.D.C. 1991); *cf.*, *e.g.*, AMVAC Appeal at 35.

respect to how the parties handled extension requests, or other disputed issues of material fact are present, the Presiding Officer may “evaluate the credibility of [the parties] witnesses based on live testimony” at the hearing, without the need for additional discovery. Remand at 23.

For the remaining data requirements, in which OPP provided clear waiver denials, clearly informed AMVAC that data remained outstanding, and in which AMVAC clearly failed to submit additional data or waiver requests, the Presiding Officer can determine that AMVAC failed to take appropriate steps to secure the data required by the DCPA DCI as there are no disputed issues of material fact to resolve. If, after reviewing the record and evaluating the credibility of the parties’ witnesses at hearing, the Presiding Officer determines that OPP failed to establish an adequate factual basis for suspension as to any of the remaining data requirements, she may rule accordingly. Any probative value of resolving the few minor—actually relevant—questions of material fact in advance of the hearing is vastly outweighed by the unreasonable burden of the discovery that AMVAC seeks from OPP. *Infra* Section II.B.5. AMVAC’s Motion fails to justify the broad scope of its discovery requests in context of the actual statutory questions before the Presiding Officer.

2. Selective Enforcement is Permissible and has not been Alleged

Although not directly alleged, many of AMVAC’s discovery requests are clearly designed to support a “selective enforcement” defense in this proceeding. For example, RFAs 4 through 9 are not targeted at understanding the basis of Ms. Bloom’s comments concerning the typicality of AMVAC’s conduct, but rather attempt to demonstrate that OPP’s decision to pursue suspension in this matter is an atypical—and, implicitly, impermissible—exercise of selective enforcement. As AMVAC clearly recognizes, the bar to establish that an agency’s wide enforcement discretion was “motivated by an arbitrary or unjustifiable consideration” is “a

daunting burden.” *In re Newell Recycling Co.*, 8 E.A.D. 598 at *24-25 (EAB 1999) (internal quotations omitted); AMVAC Motion at 15. AMVAC is correct that the resolution of this suspension case “may have implications for non-party registrants.” AMVAC Motion at 15. To the extent that OPP may have chosen to pursue suspension against AMVAC in order to encourage compliance with DCIs more generally, that “is an entirely appropriate goal” with respect to ensuring that EPA can obtain additional data or information needed to conduct its review of pesticide products through exercise of its data call-in authority under FIFRA Section 3(c)(2)(B). *See In the matter of Martex Farms, Inc.*, FIFRA-02-2005-5301, Order Denying Respondent’s Motion Requesting Recommendation of Interlocutory Review at 11 (EPA, Oct. 5, 2005).

AMVAC’s attempts to circumvent the principle of enforcement discretion are unconvincing. First, as noted above in Section II.B.1, it inappropriately reads the Board’s ruling concerning the “course of performance” as to extension requests and possibly certain other claims in the Bloom statement, as requiring a full-fledged examination of OPP’s past interpretations and applications of its policies concerning DCI enforcement and suspension more broadly. AMVAC Motion at 15. Although the thrust of AMVAC’s argument in this case is that its actions were typical of other registrants in responding to DCIs, it has made no attempt to equate “typicality” with “appropriate[ness].” OPP’s decision not to seek enforcement against other registrants for failure to comply with DCI data requirements does not constitute evidence that other registrants have acted appropriately. As this administrative litigation makes abundantly clear, the process of suspending a registration is a significant burden to Respondent’s resources. The fact that EPA rarely seeks suspension of registrations under FIFRA Section 3(c)(2)(B)(iv) should not be interpreted as an endorsement of registrants’ decisions to drag out the process of

responding to DCIs. Just as the argument that “everyone else was speeding too” is not an appropriate defense to the issuance of a speeding ticket, neither is the argument “it is typical for registrants to delay compliance with a DCI” an appropriate defense to a NOITS, nor is it a sufficient rationale to seek production of records concerning the conduct between EPA and other registrants, generally.

Additionally, AMVAC’s interpretation of enforcement discretion—as somehow being inapplicable to situations in which the statutory standard incorporates a “notion of propriety”—is wholly unsupported. *See In the matter of Service Oil, Inc.*, CWA-08-2005-0010, 2007 WL 3138354, Initial Decision at *8, *57-58 (EPA 2007) (finding no selective enforcement claim in an enforcement action partially based on “the proper implementation of all items” in respondent’s permit). To adopt AMVAC’s position would render the concept essentially meaningless in any enforcement matter where EPA is called upon to weigh the appropriateness of actions taken by a regulated entity. AMVAC has made no attempt to support—or even to formally allege the recognized elements of—a claim of “selective enforcement”; additional discovery to develop that argument is unwarranted.

3. Some of AMVAC’s Requests are for Publicly-Available Records

AMVAC’s proposed discovery contains requests for information that is publicly available, for which OPP is on a virtually equal footing with AMVAC in obtaining from various online resources, and for which the parties are likely to undertake virtually identical methods of information gathering. *See In the matter of Nicor Gas*, TSCA-HQ-2015-5017, 2016 WL 7035584, Order on Respondent’s Motion for Additional Discovery and For Extension of Time at *7 (EPA 2016). Under 40 C.F.R. § 164.51(a)(2), such information patently fails to meet the criteria of “not otherwise obtainable.” For example, INT 13 and RFP 28 seek to force EPA to

search the record of all DCIs issued on or after 2009, list which required the submission of a certain study, and to provide a copy of any EPA response to registrants' submission of data or information responsive to such studies. OPP does not maintain a searchable database of all DCI requirements across chemicals; collecting and producing this information would require looking at the public docket for each individual DCI. In searching the public dockets for the myriad scientific reviews that OPP has and continues to conduct in furtherance of its statutory mission, Respondent would essentially be performing legal research for AMVAC.

4. OPP's Deliberative Process Privilege

Many of AMVAC's discovery requests seek information that is predecisional and deliberative, and thus protected by the deliberative process privilege established by *In the matter of Chautauqua Hardware Corporation*, EPCRA Appeal No. 91-1, Order on Interlocutory Review (EAB, June 24, 1991). *See In the Matter of Safety-Kleen Corp.*, V-W-003-93, 1994 WL 16787160, Order Denying Respondent's Request for Production of Documents at *3-5 (EPA 1994). To be "predecisional," a document must involve "only those communications that occur before the adoption of the final rule or policy." *Chautauqua* at 14. To be "deliberative," a document must "somehow reflect or reveal the deliberative process by which a final policy was formulated." *Id.*; *see also Safety-Kleen* at 4. Here, AMVAC seeks discovery of OPP records pre-dating the decision to seek suspension of the DCPA product, which are clearly pre-decisional. AMVAC Motion at 12-14. AMVAC is specifically seeking records pertaining to OPP's internal deliberations as to: the propriety of AMVAC's actions with respect to the DCPA DCI, its ability to conduct risk evaluations of DCPA without data required by the DCPA DCI, and the need to issue the NOITS. AMVAC Motion at 12-14, *see also, e.g.*, RFP 5. Production of this material is

not relevant to the proceeding—see Section II.B.1—and would in any case be privileged from production.

5. AMVAC’s Requests Are Likely to Result in Unreasonable Delay

The volume and nature of AMVAC’s discovery requests would either unreasonably burden Respondent or, if Respondent were ordered to comply with the requests, would unreasonably delay this proceeding. In the October 18 Order, the Presiding Officer provided that “[a]ll discovery shall be completed no later than December 2,” only 32 calendar days following submission of the parties’ final discovery motions. Respondent maintains that the clear language of FIFRA Section 3(c)(2)(B)(iv) requiring EPA to make a determination within 75 days, the Remand’s clear language that a hearing is necessary but lack of language concerning a broad expansion of the scope of said hearing,⁵ and the short discovery period provided by the Presiding Officer all weigh in favor of denying additional discovery or, at the very least, heavily restricting the discovery to a limited subset of information probative to the question of “whether AMVAC failed to take appropriate steps to secure the data to fulfill [the DCPA DCI].” Remand at 28.

Respondent has developed a very limited request for other discovery, consisting of 26 requests for admission of simple facts, nearly all of which are already demonstrated by the record, and 6 requests for production of documents concerning AMVAC’s decision to take steps—with respect to securing the data required by the DCPA DCI—which were substantially similar to steps that EPA had previously rejected in waiver request denials or other communications. All of these requests are tightly focused on whether AMVAC took appropriate steps to secure the data required by the DCPA DCI, as a considerable portion of the justification AMVAC offers for its actions in filings to date are premised on the assertion that it was

⁵ *Supra* n.4.

reasonable to take actions substantially similar to prior actions already rejected by OPP. Each of Respondent's requests clearly serve the Presiding Officer's stated purpose of expediting the hearing (by demonstrating the clear factual bases for suspension as to at least six data requirements) and in simplifying contested issues (*e.g.*, concerning AMVAC's rationale for taking actions similar to those previously rejected by OPP). *See* October 18 Order at 2.

In contrast, AMVAC's 49 RFAs, 18 INTs, 31 RFPs, and requests for the deposition of at least 7 OPP personnel would serve primarily to hinder Respondent and its witnesses as they prepare for hearing. As explained elsewhere in this motion, AMVAC seeks information concerning broad topics of OPP enforcement discretion, scientific review, and other information unrelated to resolving the question of whether AMVAC's own actions were appropriate attempts to satisfy the DCPA DCI. To the extent that genuine issues of material fact were created in the parties' competing witness statements, the hearing provides an adequate venue for the Presiding Officer to weigh said witnesses' credibility and make appropriate findings. AMVAC understates the burden of searching for, collecting, reviewing for privilege, and providing the requested discovery, to say nothing of preparation for and scheduling seven or more depositions on wide-ranging topics, all within a single month.⁶

6. Hearing Provides an Appropriate Venue to Fully Develop Relevant Topics

Many of the topics addressed through AMVAC's requests for discovery can be sufficiently addressed by the record already provided and at the hearing scheduled for January.

⁶ Respondent objects to AMVAC's assertions as to the parties' relative resources. AMVAC Motion at 8. AMVAC is not similarly situated to the incarcerated low-level drug offender in *U.S. v. Parker*, and the mere fact that OPP is one part of the U.S. Federal Government does not suggest that it has unlimited, or even adequate, capacity to respond to any discovery request, no matter how voluminous or non-probative. Respondent suggests that AMVAC compare the number of attorneys who have entered notices of appearance for each party in this matter.

As stated in *In re Motiva Enterprises LLC*, RCRA-3-2000-0004, 2001 WL 1557780 at *3 (EPA 2001):

The standard for discovery under the Rules of Practice is more restrictive than that under the Federal Rules of Civil Procedure. In general, the information provided through the prehearing exchange and the ability to cross-examine witnesses at the hearing is sufficient in these proceedings. Despite this more restrictive standard, courts applying the Rules of Practice have recognized that discovery will be granted if “a refusal to do so would so prejudice a party as to deny him due process.” Whether a refusal to grant additional discovery presents a due process problem depends on the particular situation of each case.

(internal citations omitted). As stated in Section II.B.1 and in Respondent’s numerous filings before the Presiding Officer and the Board, the record provides ample evidence that AMVAC failed to take appropriate steps to secure the data required by the DCPA DCI. With respect to the limited set of disputed material facts raised by competing witness statements, AMVAC will have sufficient opportunity to cross examine said witnesses at the hearing. It has made no argument that a refusal to grant additional discovery presents a due process concern or would otherwise prejudice its case as to that critical statutory question. AMVAC’s requests for deposition, and several of its other discovery requests, seek only to divert attention from AMVAC’s conduct and to focus this proceeding on irrelevant and/or privileged OPP-internal conduct.

7. AMVAC Seeks Discovery on Legal, Non-Factual Matters

Several of AMVAC’s discovery requests seek information concerning legal conclusions rather than factual matters. AMVAC Motion at 19-20 (seeking information concerning EPA’s position on the statutory phrases “within the time required by the Administrator” and “failed to take appropriate steps to secure the data required”). Not only are these requests seeking non-factual “materials embodying [OPP] officials’ opinions” that would be protected by the deliberative process privilege discussed in Section II.B.4, but the Presiding Officer specifically ordered the parties to address those same legal questions in prehearing briefs, including the

citation of “any relevant statutory or regulatory history, case law, and/or or other authority relied upon for interpretation.” October 18 Order at 2-3; *see Safety-Kleen* at 4. Contrary to AMVAC’s assertions, such requests are not relevant to the factual bases of the NOITS; additional discovery on these questions is neither necessary nor appropriate.

8. OPP Intends to Voluntarily Comply with Relevant Discovery

As indicated to AMVAC, OPP intends to voluntarily comply with discovery requests that meet the criteria of 40 C.F.R. § 164.51(a). For example, Respondent intends to admit RFA 1, which requests admission concerning the transmission dates of numerous documents. The logical basis for AMVAC’s assertion that OPP’s agreement to provide some information “highlights the need” for the Presiding Officer to order compliance with the full gamut of AMVAC’s discovery requests is not explained. AMVAC Motion at 17. Respondent notes that OPP had less than one business day to consider AMVAC’s initial proposed discovery, evaluate each request against the § 164.51(a) criteria, request clarification from, and reply to AMVAC. Given that fewer than four business days separate the parties’ filing of motions for additional discovery and the deadline to respond to said motions provided by the Presiding Officer, Respondent is not able to provide definitive answers to AMVAC’s RFAs by the date of this opposition motion. However, Respondent indicates, in each sub-section of Section III below, which discovery requests OPP intends to voluntarily comply with. Specifically, Respondent intends to voluntarily provide responses to 39 of AMVAC’s 49 RFAs (1, 11-42, 44-49), 2 of AMVAC’s 18 INTs (11, 12), and 3 of AMVAC’s 31 RFPs (21, 22, 24).

III. MOST OF AMVAC’S REQUESTS FAIL TO SATISFY THE STANDARD

For ease of reference, Respondent largely adopts AMVAC’s categorization of the topics on which it requests discovery. *See* AMVAC Motion section III.B. For each category,

Respondent indicates the general reason(s) that AMVAC fails to meet the standard for the Presiding Official to permit further discovery by reference to the appropriate sub-sections of Section II.B., above. With respect to certain categories and certain specific discovery requests, Respondent also provides additional discussion.

A. Typicality

General objections to this category of requests, as explained in Section II.B. of this opposition:

- II.B.1: AMVAC's seeks information beyond the scope of the hearing as to RFAs 4-9, INTs 1-3, 8, RFPs 5-6, 12-13. AMVAC seeks to compare the conduct of other registrants in complying with DCIs.
- II.B.2: AMVAC seeks to demonstrate an unalleged "selective enforcement" claim as to all requests by comparing the conduct of other registrants to the instant situation.
- II.B.3: AMVAC seeks publicly available information as to INTs 2-3. AMVAC is equally situated to OPP to search the public dockets of EPA registration review cases to determine which contain OPP publications issued without satisfaction of all DCI data requirements at the time the document was created.
- II.B.4: AMVAC seeks information protected by the deliberative process privilege as to INT 8, RFPs 5-6, 12-13. Specifically, it seeks information concerning EPA's decision to issue the NOITS.
- II.B.5: AMVAC's request constitutes an unreasonable burden likely to result in unreasonable delay as to INTs 1-3, RFP 6. The request seeks voluminous information concerning and EPA analysis of hundreds of registration review cases and thousands of DCI data requirements.

- II.B.6: AMVAC seeks information that can easily be developed at hearing as to RFAs 4-9. It will have the opportunity to cross-examine Bloom, whose witness statement constitutes the basis for these requests.

B. Course of Performance/Extensions/Waivers

- II.B.8: Respondent will voluntarily comply with AMVAC’s three requests.

Respondent re-iterates that the Board did not hold “that the ‘course of performance’ between the parties was material in general.” *Contrast with* AMVAC Motion at 10. The Remand addressed course of performance directly only in the context of “how [the parties] handled extension requests.” Remand at 22. Given that the Board mentioned course of performance only once more, in a citation to *Alabama v. North Carolina*, 560 U.S. 330, 346 (2010), AMVAC is apparently misconstruing that citation as the Board directing the Presiding Officer to examine OPP’s course of performance in a universal fashion.⁷

C. OPP Contentions Regarding Specific AMVAC Actions

- II.B.1: AMVAC seeks information beyond the scope of the hearing as to INTs 14, 15, 16, 17. AMVAC seeks to show that EPA sometimes took long periods of time to reply to AMVAC’s submissions, which is not relevant to the factual basis of the NOITS.
- II.B.4: AMVAC seeks information protected by the deliberative process privilege as to RFPs 12, 13. Specifically, it seeks information concerning EPA’s decision to issue the NOITS.

⁷ It is also worth noting that the Supreme Court’s examination of “course of performance” in *Alabama* was limited to a single claim at issue in that case.

- II.B.6: AMVAC seeks information that can easily be developed at hearing as to INTs 9, 10, 14, 15, 16, 17. It will have the opportunity to cross-examine Bloom, whose witness statement constitutes the basis for these requests.
- II.B.7: AMVAC seeks discovery on non-factual matter as to INT 18. The Presiding Officer specifically required this question to be addressed in the parties' prehearing briefs.
- II.B.8: OPP will voluntarily provide responses to RFA 11, 12, 13, 14 and INT 11.

Respondent notes that, in several filings before the Presiding Officer and the Board, it has identified actions taken by AMVAC that could be interpreted as "dilatatory," "repetitive," or "unsubstantiated. *See, e.g.*, Response Brief at 27-32 (discussing AMVAC's decision not to conduct residue data studies and to continue submitting proposed labels with no plant-back prohibition for crops lacking DCPA tolerances after being informed on two occasions that EPA would not waive the data requirements). Respondent once again notes that Bloom's statements concerning these phrases does not represent a factual basis for the NOITS and is thus not relevant to the purpose of this proceeding.

D. Timeframes in the DCI

- II.B.1: AMVAC seeks information beyond the scope of the hearing as to RFPs 9, 10. AMVAC seeks to show that EPA sometimes took long periods of time to reply to AMVAC's submissions, which is not relevant to the factual basis of the NOITS.
- II.B.2: AMVAC seeks to demonstrate an unalleged "selective enforcement" claim as to RFPs 9, 10. Specifically, it seeks to show that OPP's review of other DCIs sometimes involves delays.

- II.B.6: AMVAC seeks information can easily be developed at hearing as to INTs 6, 7, RFPs 9, 10. It will have the opportunity to cross-examine Bloom, whose witness statement constitutes the basis for its irrelevant assertions as to EPA delays.
- II.B.7: AMVAC seeks discovery on non-factual matter as to INTs 6, 7. The Presiding Officer specifically required this question to be addressed in the parties' prehearing briefs.

E. Ability to Proceed with a Risk Assessment

- II.B.1: AMVAC seeks information beyond the scope of the hearing as to RFAs 2, 9, 10, INT 2, RFP 14. Specifically, it seeks information concerning EPA's need for certain data to complete risk evaluation.
- II.B.2: AMVAC seeks to demonstrate an unalleged "selective enforcement" claim as to RFAs 2, 9, 10, INT 2, RFP 11, RFP 14. Specifically, it seeks to compare EPA's ability to conduct risk assessments with respect to other registration review cases with the instant case.
- II.B.3: AMVAC seeks publicly available information as to INT 2. AMVAC is equally situated to OPP to search the public dockets of EPA registration review cases to determine those in which OPP published a DRA without satisfaction of all DCI data requirements.
- II.B.4: AMVAC seeks information protected by the deliberative process privilege as to RFP 14. It seeks information on EPA's decision that it could not complete risk assessment without data required by the DCPA DCI.

- II.B.6: AMVAC seeks information that can easily be developed at hearing as to RFAs 2, 9, 10. It will have the opportunity to cross-examine four OPP witnesses concerning the DCPA risk assessment.

Respondent notes that AMVAC's proffered basis for these discovery requests relies, at least in part, on the unfounded notion that OPP was required, before issuing the NOITS, to provide a distinct notice to AMVAC that OPP could not proceed with risk assessment, which AMVAC presumably interprets as initiating a new time period for AMVAC to provide the needed data. The legal standard to suspend AMVAC's registration under FIFRA Section 3(c)(2)(B)(iv), as interpreted by the Board, is whether AMVAC failed to take appropriate steps with respect to each data requirement of the DCPA DCI. Remand at 26. AMVAC has not, and indeed cannot, point to any requirement for OPP to reassert why the Agency requires additional data, such as to complete its risk assessment(s), or that such notice to a registrant is necessary before OPP initiates suspension pursuant to FIFRA Section 3(c)(2)(B)(iv).

F. Communications between PRD Staff and PRD Files

- II.B.1: AMVAC seeks information beyond the scope of the hearing as to RFP 1, 2, 3, 4, 30. Specifically, it seeks information concerning EPA's internal deliberations as to issuance of the NOITS.
- II.B.2: AMVAC seeks to demonstrate an unalleged "selective enforcement" claim as to RFP 1, 2, 3, 4, 30. It seeks to probe OPP's decision to issue the NOITS in this matter.
- II.B.4: AMVAC seeks information protected by the deliberative process privilege as to RFP 1, 2, 3, 4, 30. It seeks to probe OPP's decision to issue the NOITS in this matter.

- II.B.5: AMVAC’s request constitutes an unreasonable burden likely to result in unreasonable delay as to RFP 2, 4. It seeks voluminous and unbounded discovery of all Agency files concerning DCPA.

G. Agency Operating Procedures and Policy Statements

- II.B.1: AMVAC seeks information beyond the scope of the hearing as to INT 4, 5, RFP 14. Specifically, AMVAC seeks information concerning OPP’s DCI-related discussions with non-party registrants. Additionally, some of AMVAC’s requested discovery may be beyond the scope of the hearing as to RFPs 7, 8, 9, 10.
- II.B.2: AMVAC seeks to demonstrate an unalleged “selective enforcement” claim as to INT 4, 5, RFPs 7, 8, 9, 10, 14. It seeks information concerning OPP’s decisions concerning appropriateness of non-party registrants’ submission of data responsive to other DCIs, and concerning EPA’s decisions as to whether it could move forward with risk assessment in this or other cases.
- II.B.4: AMVAC seeks information that may be protected by the deliberative process privilege with respect to certain responsive information. Respondent has not completed its search for information pursuant to RFPs 7, 8, 9, 10 and, accordingly, is preserving its right to invoke this privilege as to any such production.
- II.B.5: AMVAC’s request constitutes an unreasonable burden likely to result in unreasonable delay as to INT 4, 5. It seeks voluminous and unbounded discovery concerning any DCI-related meetings with non-party registrants.
- II.B.8: Respondent will voluntarily provide responses to RFPs 7, 8, 9, 10, to the extent that any such responsive production does not invoke OPP’s deliberative process privilege.

H. Non-Issuance/Receipt of Documents

- II.B.1: AMVAC seeks information beyond the scope of the hearing as to RFA 3, 23, 40, 41, 43, RFP 12, 16. It seeks information concerning a variety of topics intended to distract from the factual bases of the NOITS.
- II.B.2: AMVAC seeks to demonstrate an unalleged “selective enforcement” claim as to RFA 3, 40. It seeks to demonstrate that OPP did not provide repeat communications that AMVAC alleges are typical in registration review.
- II.B.4: AMVAC seeks information protected by the deliberative process privilege as to RFPs 12, 16. It seeks information concerning OPP’s internal review of and conclusions as to data submissions.
- II.B.5: AMVAC’s requests constitute an unreasonable burden likely to result in unreasonable delay as to RFP 29. The purpose of the request is unclear, AMVAC is apparently asking EPA to newly generate potentially voluminous data supporting any decision not to admit any of AMVAC’s specified RFAs.
- II.B.6: AMVAC seeks information that can easily be developed at hearing as to RFA 23, 43. These RFAs constitute clear misstatements of the factual bases of the NOITS, and are appropriate for resolution by the Presiding Officer.
- II.B.8 Respondent will voluntarily provide responses to RFAs 1, 15, 16, 17, 18, 25, 27, 31, 38, 45, 46, INT 12, RFPs 21, 22, 24.

Respondent re-iterates that there is no statutory or regulatory requirement for OPP to issue a warning to AMVAC or other registrants that OPP cannot proceed with risk assessment prior to issuing a NOITS. The legal standard to suspend AMVAC’s registration under FIFRA Section 3(c)(2)(B)(iv), as interpreted by the Board, is whether AMVAC failed to take appropriate steps

with respect to each data requirement of the DCPA DCI. Remand at 26. AMVAC has not, and indeed cannot, point to any requirement for OPP to reassert why the Agency requires additional data, such as to complete its risk assessment(s), or that such notice to registrant is necessary before OPP initiates suspension pursuant to FIFRA Section 3(c)(2)(B)(iv).

I. Requests Concerning Specific Data Requirements

- II.B.1: AMVAC seeks information beyond the scope of the hearing as to RFPs 15, 16, 17, 18, 19, 20, 23, 25, 26, 27, 28, 31. AMVAC seeks to probe OPP's internal decision process concerning the need for additional data and the sufficiency of AMVAC's submissions.
- II.B.2, seeks to demonstrate unalleged "selective enforcement" claim as to RFPs 15, 16, 17, 18, 19, 20, 23, 25, 26, 27, 28, 31. AMVAC seeks to probe OPP's internal decision process in furtherance of its theory of impermissible selective enforcement.
- II.B.3: AMVAC seeks publicly available information as to INT 13. AMVAC is equally situated to OPP to search the public dockets of EPA registration review cases to determine those in which OPP required a study "substantially equivalent" to the special study 1072 of DCPA's chronic sediment toxicity in *leptocheirus* included in the DCPA DCI.
- II.B.4: AMVAC seeks information that would necessarily invoke the deliberative process privilege as to RFPs 15, 16, 17, 18, 19, 20, 23, 25, 26, 27, 28, 31.
- II.B.5: AMVAC's requests constitute an unreasonable burden likely to result in unreasonable delay as to INT 13, RFPs 19, 28. The request would require searching through hundreds of registration review cases and thousands of DCI data requirements for chronic sediment toxicity studies in *leptocheirus*.

- II.B.8: Respondent will voluntarily provide responses to: RFAs 19 through 42, 44 through 49.

J. OPP's Voluntary Compliance

In each sub-section of Section III, above and below, Respondent indicates which, if any, discovery requests it will voluntarily comply with. Respondent's decision to voluntarily provide information that could reasonably be considered outside the scope of additional discovery warranted by 40 C.F.R. § 164.51(a) criteria (*e.g.*, INTs 11 and 13) should not be interpreted as waiver of any general argument in opposition to AMVAC's discovery requests, or waiver of any argument as to those topics' relevance to this proceeding. Where providing non-relevant or non-probative information constitutes only a small burden on Respondent, it is electing to make said production and reserve any argument about relevancy if and until these facts are used to support arguments at hearing. Respondent notes that, after further review of AMVAC's final Motion, its response to INT 8 is likely to invoke deliberative process privilege.

K. AMVAC's Requests for Deposition

1. Fed. R. Civ. P. Rule 30(b)(6) Witness(es)

- II.B.1: Deposition of such witnesses is targeted at topics beyond scope of hearing.

AMVAC is seeking information concerning OPP's administration and enforcement of other DCIs. Where appropriate, Respondent will provide "the agency's position" as to legal questions at issue in this matter.

- II.B.2: AMVAC seeks to demonstrate unalleged "selective enforcement" claim through this deposition. Specifically, it seeks to probe OPP's enforcement or non-enforcement of other DCIs as to non-party registrants.

- II.B.4: Deposition of such witnesses would necessarily invoke deliberative process privilege as to most responses.
- II.B.5: Selection and deposition of these witnesses would constitute an unreasonable burden likely to result in unreasonable delay. AMVAC seeks deposition of potentially numerous witnesses concerning OPP's positions as to various policy matters. •

2. Michael Goodis

- II.B.1: The desired deposition seeks information beyond the scope of the hearing as to topics 1, 3, 4, 6. These topics are not relevant to the factual bases of the NOITS.
- II.B.2: AMVAC seeks to demonstrate an unalleged "selective enforcement" claim as to topics 1, 3, 4, 5, 6. It seeks information concerning OPP's administration and enforcement of other DCIs.
- II.B.4: The desired deposition would necessarily invoke deliberative process privilege as to topics 1, 2, 4, 6.
- II.B.5: The desired deposition would constitute an unreasonable burden likely to lead to unreasonable delay, generally. AMVAC's purposes for seeking to depose Goodis are irrelevant or would invoke OPP's deliberative process privilege, and clearly constitute an attempt to burden Respondent's hearing preparation.
- II.B.6: The desired deposition seeks information that can easily be developed at hearing as to topics 2, 5. It concerns matters that have clearly been stated in Respondent's filings to the Presiding Officer and the Board, and which can be further resolved through future legal filings or statements at the request of the Presiding Officer.

Respondent notes that one justification for AMVAC's request to depose Goodis and Reaves (topics 2 and 3, respectively) is based on the incorrect assertion that the existing stocks provision

in this case is based on “risk concerns.” AMVAC Appeal at 39 (incorporating argument from Notice of Exceptions and Appeal Brief of Petitioners Grower Group at 7). As explained in Respondent’s brief before the Board, that assertion is unfounded; the existing stocks provision of the NOITS is clearly consistent with the non-risk-based rationale for disallowing continued sale or use of a product under EPA’s longstanding policy. Respondent’s Appeal at 37-41.

3. Mary Elissa Reaves

- II.B.1: The desired deposition seeks information beyond the scope of the hearing as to topics 2, 5. These topics are not relevant to the factual bases of the NOITS.
- II.B.2, AMVAC seeks to demonstrate an unalleged “selective enforcement” claim as to topics 1, 2, 3, 5. It seeks information concerning OPP’s administration and enforcement of other DCIs.
- II.B.3: AMVAC’s deposition seeks information already available as to topic 1. The factual basis of the NOITS is set out in that document and further explained in the record already produced and Respondent’s filings before the Presiding Officer and the Board.
- II.B.4: AMVAC’s desired deposition would necessarily invoke the deliberative process privilege as to topic 3.
- II.B.5: The desired deposition would constitute an unreasonable burden likely to lead to unreasonable delay, generally. AMVAC’s purposes for seeking to depose Reaves are irrelevant or would invoke OPP’s deliberative process privilege, and clearly constitute an attempt to burden Respondent’s hearing preparation.
- II.B.6: The desired deposition seeks information that can easily be developed at hearing or through other means as to topic 4. Many of AMVAC’s other discovery requests go to the same issues. Additionally, AMVAC will have an opportunity to cross-examine

Bloom at the hearing, whose statement forms the basis for AMVAC's questions as to these topics.

4. Jill Bloom

- II.B.1: AMVAC's desired deposition seeks information that is beyond scope of the hearing as to topics 1, 2. OPP's process of setting DCI time frames and the question of non-party registrants' compliance with other DCIs is not a factual basis of the NOITS.
- II.B.2: AMVAC's desired deposition seeks to demonstrate an unalleged "selective enforcement" claim as to topics 1, 2, 5. AMVAC seeks information about OPP's enforcement of and non-party registrants' responses to DCIs.
- II.B.4: AMVAC's desired deposition would necessarily invoke the deliberative process privilege as to topics 1, 2.
- II.B.5: The desired deposition would constitute an unreasonable burden likely to lead to unreasonable delay, generally. AMVAC's purposes for seeking to depose Bloom are irrelevant or would invoke OPP's deliberative process privilege, and clearly constitute an attempt to burden Respondent's hearing preparation.
- II.B.6: AMVAC's desired deposition seeks information that can easily be developed at the hearing as to topics 3, 4, 5. These topics directly cite or reference Bloom's witness statement, which served as her direct testimony. AMVAC will have the opportunity to cross-examine Bloom during the hearing.

5. Other Witnesses

- II.B.1: AMVAC's desired deposition seeks information that is beyond the scope of the hearing as to topics 2, 3, 4. The Board ruled that the necessity of data in the DCPA DCI is not at issue in this proceeding. Remand at 23.

- II.B.2: AMVAC’s desired deposition seeks to demonstrate an unalleged “selective enforcement” claim as to topics 2, 3, 4, premised on the improper attempt to address the question of whether the data required by the DCPA DCI is necessary.
- II.B.3: AMVAC’s desired deposition seeks information already available as to topics 1. The factual and scientific bases for OPP witnesses’ statements is set out clearly in their verified witness statements.
- II.B.4: AMVAC’s desired deposition would necessarily invoke the deliberative process privilege as to topics 2, 3, 4.
- II.B.5: The desired deposition would constitute an unreasonable burden likely to lead to unreasonable delay, generally. AMVAC’s purposes for seeking to depose Drew, Wentz, and Wendel are irrelevant or would invoke OPP’s deliberative process privilege, and clearly constitute an attempt to burden Respondent’s hearing preparation.
- II.B.6: AMVAC’s desired deposition seeks information that can easily be developed at the hearing as to topic 1. These topics directly reference material in OPP witnesses’ statements, which served as their direct testimony. AMVAC will have the opportunity to cross-examine each of these witnesses during the hearing.

IV. CONCLUSION

As explained above, most of AMVAC’s discovery requests and requests for deposition fail to satisfy one or more of the criteria of 40 C.F.R. § 164.51. The vast majority of AMVAC’s requests are not relevant to the primary statutory question before the Presiding Officer: whether AMVAC failed to take appropriate steps with respect to each requirement listed in the DCPA NOITS. Additionally, it is clear that this court did not intend additional discovery to encompass the broad range of non-relevant topics sought by AMVAC. To the extent that AMVAC’s

discovery requests satisfy the regulatory criteria and are relevant to this proceeding, Respondent will voluntarily provide responses. Accordingly, Respondent moves that the Presiding Officer deny AMVAC's request for additional discovery.

Respectfully submitted,

Dated: October 31, 2022

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***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; Sunheaven Farms, LLC; J&D Produce; Ratto Bros., Inc.; and Huntington Farms, Petitioners.
Docket No. FIFRA-HQ-2022-0002

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Respondent's Opposition to AMVAC's Motion for Additional Discovery**, dated October 31, 2022, was sent this day to the following parties in the manner indicated below.

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