

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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2014 MAY -5 PM 4:22

In the Matter of:)
)
Reckitt Benckiser LLC, et al.)
)
EPA Reg. Nos. 3282-3, 3282-4, 3282-9,)
3282-15, 3282-65, 3282-66, 3282-74,)
3282-81, 3282-85, 3282-86, 3282-87,)
and 3282-88; Application Nos. 3282-RNU)
and 3282-RNL)

FIFRA Docket No. 661

RESPONDENT'S MOTION FOR ADDITIONAL DISCOVERY
OF PETITIONERS LOUISVILLE APARTMENT ASSOCIATION,
GREATER CINCINNATI NORTHERN KENTUCKY APARTMENT ASSOCIATION,
AND DO IT BEST CORPORATION

The Assistant Administrator for Chemical Safety and Pollution Prevention

("Respondent") moves for additional discovery of petitioners Louisville Apartment Association, Greater Cincinnati Northern Kentucky Apartment Association, and Do It Best Corporation ("User and Retailer Petitioners"), pursuant to 40 C.F.R. § 164.51 and in accordance with the Prehearing Order dated February 10, 2014.

Respondent has conferred with the other parties in regard to this motion. User and Retailer Petitioners are reviewing the information request and have no position at this time but will indicate their opposition, if any in a response to this motion. Reckitt Benckiser LLC is reviewing EPA's discovery motion and will report to the Court if it has any objections to EPA's discovery requests at the time Reckitt files its response to EPA's discovery motion. The intervenors West Harlem Environmental Action, Natural Resources Defense Council, American

Bird Conservancy, Center for Biological Diversity, Defenders of Wildlife, and Sierra Club have no objection to this motion.

Further review and discussions may result in User and Retailer Petitioners agreeing to provide information satisfying some or all of the discovery requests below, but the outcome cannot be predicted. In order to expeditiously conclude this additional discovery phase of the proceeding, Respondent urges the Tribunal to grant in full the document discovery requested below, with the understanding that ongoing discussions among the parties may result in disclosures of subsets of, or alternatives to, the requested information that Respondent would accept as satisfying the discovery order in whole or in part.

I. Requested Document Discovery

Respondent moves for discovery of the documents described in this section I.

Respondent proposes that User and Retailer Petitioners be required to provide to Respondent copies of the responsive documents specified above within 30 days after the Administrative Law Judge's ("ALJ") order granting this discovery motion, or at such other time as the ALJ considers appropriate. For each document produced in response to a request for documents, Respondent proposes that User and Retailer Petitioners be required to indicate on the document, or in some other reasonable manner, the numbered request to which it responds. If the response to any of the following discovery requests would require additional documents to be produced in order to be complete, comprehensible or non-misleading, Respondent proposes that User and Retailer Petitioners be required to include such additional documents as are necessary.

A. Definitions

1. The words "and," "and/or" and "or" shall each be deemed to refer to both their conjunctive and disjunctive meanings, being construed as necessary to bring within the

scope of the discovery request all information and documents which would otherwise be construed as being outside the request..

2. The word “any” shall mean “each and every” and “all” as well as “any one,” and “all” shall mean “any and all.”
3. “Document” includes every item and form of data encompassed by the broad definition set forth in Federal Rule of Civil Procedure 34(l). Document shall mean the original, all copies and drafts of papers and writings of every kind, description and form, and all mechanical: magnetic media and electronic recordings, records and data of every kind, description and form, and all photographs of every kind. Document also includes files, folder tabs, and labels appended to or containing any documents.
4. “NOIC” means the February 5, 2013 Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products.
5. “Non-target” means any animal or animal species (including humans and other mammals, birds, reptiles and amphibians) that was not the intended target of a rodenticide application.
6. “Owners/managers of multi-unit housing/dwellings” means any owner, manager, and any employee, agent or person acting on their behalf, of any apartment, dormitory, hotel, hospital, or other facility providing short- or long-term accommodations.
7. “Person” means any natural person, corporation, partnership, joint venture, limited liability company, proprietorship, governmental or business entity.
8. “Petitioners” means Reckitt Benckiser LLC, Louisville Apartment Association, Greater Cincinnati Northern Kentucky Apartment Association, and Do It Best Corporation.
9. “Product” means a rodenticide product distributed and sold pursuant to a particular EPA registration number, or, in regard to traps and other devices, any distinct retail sale unit.
10. “Product presentation” means any retail unit of a pesticide product that distinguishable by its packaging or size from other retail units sold under the same EPA registration number. For example, the 1.5 ounce and 3 ounce retail units of d-CON Mouse Prufe II, EPA Reg. No. 3282-65, would be two distinct product presentations.
11. “Reckitt” means Reckitt Benckiser LLC Inc.
12. The words “relates to” or “relating to” shall mean and include the following terms: regards, describes, involves, compares, correlates, mentions, connected to, refers to, pertains to, contradicts, or compromises.
13. “Residential consumer” means any purchaser or user of rodent control products or services, other than owners/managers of multi-unit housing/dwellings, non-residential

commercial users (e.g., retail, services, manufacturing), pest control operators, agricultural users, or government employees.

14. "Rodent control products" means rodenticide baits, rodenticide tracking powders, mechanical traps, glue boards, etc.
15. "Rodenticide" means bait products intended for use in rodent control and containing any of the following active ingredients: brodifacoum, bromadiolone, bromethalin, chlorophacinone, cholecalciferol, difenacoum, difethialone, diphacinone (and its sodium salt), warfarin (and its sodium salt), or zinc phosphide.
16. "User and Retailer Petitioners" means petitioners Louisville Apartment Association, Greater Cincinnati Northern Kentucky Apartment Association, and Do It Best Corporation, both individually and collectively, and any division, branch, department, region, business, parent, subsidiary, affiliate or member thereof; any corporate predecessor or successor thereof; or any person acting or purporting to act on its behalf, including all present and former officers, directors, investors, employees, agents, managers, representatives, field representatives, personnel, attorneys, consultants, experts, investigators or other persons.
17. Words in the singular include the plural, and vice versa.

B. Specific Discovery Requests, and Reasons Therefore

1. All documents in Reckitt's User and Retailer Petitioners' possession, custody or control concerning the nature, frequency and extent of rodent infestations in multi-unit housing/dwellings.
2. All documents in Reckitt's User and Retailer Petitioners' possession, custody or control concerning the responses of residents of multi-unit housing/dwellings to rodent complaints.
3. All documents in Reckitt's User and Retailer Petitioners' possession, custody or control concerning the responses of owners/managers of multi-unit housing/dwellings to rodent complaints.
4. All documents in User and Retailer Petitioners' possession, custody or control concerning rodent control actions or services in multi-unit housing/dwellings during the years 2009 through 2013.
5. All documents in User and Retailer Petitioners' possession, custody or control concerning studies, tests or analyses of the efficacy or product performance of rodent control products.

Rationale for discovery request 1 through 5: Based on previous communications with Petitioners, Respondent anticipates that disputed issues in this proceeding will include the frequency and extent of rodent infestations, the respective responses of residents and owners/managers of multi-unit housing/dwellings to rodent infestations, and the effectiveness of such responses. User and Retailer Petitioners collectively represent a significant number of retail hardware, lumber and building materials dealers and apartment owners and operators. In light of User and Retailer Petitioners' interests in the issues in this proceeding, it would seem likely that they would have information relevant to these issues that would have significant probative value in this proceeding. Absent User and Retailer Petitioners' voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery.

6. All documents in User and Retailer Petitioners' possession, custody or control concerning what residential consumers, owners/managers of multi-unit housing/dwellings, or other users are willing to pay for rodent control services and/or rodent control products.
7. All documents in User and Retailer Petitioners' possession, custody or control concerning purchases of rodent control services and/or rodent control products during the years 2009 through 2013.

Rationale for discovery requests 6 and 7: Based on previous communications with Reckitt, Respondent anticipates that one disputed issue in this proceeding will be the cost of producing consumer-use rodenticides conforming to the EPA's 2008 Risk Mitigation Decision. User and Retailer Petitioners collectively represent a significant number of retail hardware, lumber and building materials dealers and apartment owners and operators. In light of User and Retailer Petitioners' interests in the issues in this proceeding, it would seem likely that they would have information regarding the costs of rodent control services and rodent control products. Absent

User and Retailer Petitioners' voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding the economic costs of rodent control products at issue in this proceeding.

8. All documents in User and Retailer Petitioners' possession, custody or control concerning the volume of sales of rodenticide products sold in product presentations of 8 pounds or less by product presentation size during the years 1999 through 2013.
9. All documents in User and Retailer Petitioners' possession, custody or control concerning the quantities of products containing second generation anticoagulants sold during the years 1999 through 2013.
10. All documents in User and Retailer Petitioners' possession, custody or control concerning sales of other rodent control products during the years 1999 through 2013.

Rationale for discovery requests 8 through 10: Many of Reckitt's registrations allow sale in a range of sizes, which are reasonably expected to appeal to different market sectors. For example, EPA Reg. No. 3282-81 can be sold in 3 ounce, 12 ounce and 3 pound units. Although pesticide producers are required to report annual pesticide production on a per-registration basis pursuant to FIFRA section 7, these reports do not generally distinguish different product presentations within a single registration. Neither do the FIFRA section 7 production reports indicate how much is sold in particular geographic areas, e.g., urban-suburban-rural, sunbelt versus northern states, arid west versus moist east. User and Retailer Petitioners represent a significant number of retail hardware, lumber and building materials dealers across the country that sell Reckitt's d-CON products. In light of User and Retailer Petitioners' interests in the issues in this proceeding, it would seem likely that they would have information regarding the sales performance of the various rodenticide products across the nation. User and Retailer Absent User and Retailer Petitioners' voluntary disclosure of the requested information, this information

is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding the quantities of rodenticide products relevant to this proceeding that are used by residential consumers versus commercial and agricultural users, which in turn is relevant to the risks posed by rodenticide products at issue in this proceeding.

11. All documents in User and Retailer Petitioners' possession, custody or control concerning the volume and/or percentage of rodenticide sales to various types of customers (i.e., residential consumers; owners, managers, or employees of multi-unit housing /dwellings, non-residential consumer users, pest control operators, and agricultural uses) by any or all retailer members of User and Retailer Petitioners' organizations, or in any broader market.
12. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which residential consumers purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores).
13. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which owners/managers of multi-unit housing/dwellings generally purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores) and/or concerning where the user members of User and Retailer Petitioners' organizations purchase the rodent control products they use.
14. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which non-residential commercial users (e.g., retail, services, manufacturing) purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores).
15. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which pest control operators purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores).
16. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which agricultural users purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores).

Rationale for discovery requests 11 through 16: Based on previous communications with Petitioners, Respondent anticipates that this proceeding will involve disputes about where

different categories of users obtain rodent control products. User and Retailer Petitioners collectively represent a significant number of retail hardware, lumber and building materials dealers and apartment owners and operators, whose respective experiences selling and purchasing rodenticide products may be relevant to this issue. In light of User and Retailer Petitioners' interests in the issues in this proceeding, it would seem likely that they would have information regarding the rodenticide purchasing behaviors of residents and owners/managers of multi-unit housing/dwellings, pest control operators and other persons, and on other rodenticide users as well. Absent User and Retailer Petitioners' voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding the effect of the market segregation system envisioned in EPA's 2008 Risk Mitigation Decision, and alternatives thereto.

17. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which different rodent control products (including non-chemical rodent control products) are used by residential consumers, why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, quantity applied, and whether different rodent control products might be used simultaneously).
18. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which different rodent control products (including non-chemical rodent control products) are used by owners/managers of multi-unit housing/dwellings, why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, and quantity applied, and whether different rodent control products might be used simultaneously).
19. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which different rodent control products (including non-chemical rodent control products) are used by non-residential commercial users (e.g., retail, services, manufacturing), why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, and

quantity applied, and whether different rodent control products might be used simultaneously).

20. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which different rodent control products (including non-chemical rodent control products) are used by pest control operators, why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, and quantity applied, and whether different rodent control products might be used simultaneously).
21. All documents in User and Retailer Petitioners' possession, custody or control concerning the extent to which different rodent control products (including non-chemical rodent control products) are used by agricultural users, why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, and quantity applied, and whether different rodent control products might be used simultaneously).
22. All documents in User and Retailer Petitioners' possession, custody or control concerning the circumstances in which residential consumers would be more or less likely to rely on professional pest control services (including events triggering a decision to apply, frequency of application, location of application, and quantity applied, and whether different rodent control products might be used simultaneously).

Rationale for discovery requests 17 through 22: Based on previous communications with Petitioners, Respondent anticipates that one disputed issue in this proceeding will be how residential consumers and other rodenticide users apply rodenticides. User and Retailer Petitioners collectively represent a significant number of retail hardware, lumber and building materials dealers and apartment owners and operators. In light of User and Retailer Petitioners' interests in the issues in this proceeding, it would seem likely that they would have information regarding the practices and habits of their members or their members' customers regarding rodenticide use. Absent User and Retailer Petitioners' voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding how the rodenticide products relevant to this proceeding are used by residents, owners/managers of multi-

unit housing/dwellings, pest control operators, and other users, which in turn is relevant to the risks posed by rodenticide products at issue in this proceeding.

23. All documents in User and Retailer Petitioners' possession, custody or control concerning calls, letters, emails, or other communications concerning adverse effects of rodenticides.
24. All documents in User and Retailer Petitioners' possession, custody or control concerning calls, letters, emails, or other communications concerning non-target (including human, pests and wildlife) exposures to rodenticides whether or not the exposure was associated with a particular adverse effect.
25. All documents in User and Retailer Petitioners' possession, custody or control concerning how information regarding adverse effects is received or recorded, or concerning how the User and Retailer Petitioners' members respond to information regarding adverse effects of rodenticides.

Rationale for discovery requests 23 through 25: User and Retailer Petitioners collectively represent a significant number of retail hardware, lumber and building materials dealers and apartment owners and operators who, in their capacities as sellers or users of rodenticide products, might reasonably be expected to receive reports of rodenticide exposures and adverse effects associated with rodenticide use. Such information is not ordinarily available to EPA, unless someone has on his or her own initiative reported it to EPA or to a pesticide registrant required to submit the information to EPA. This information, and information regarding User and Retailer Petitioners' procedures regarding adverse effects information, may be relevant to this proceeding. Absent User and Retailer Petitioners' voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding rodenticide exposures and the adverse effects caused by rodenticide products at issue in this proceeding.

II. Withheld Documents

To extent User and Retailer Petitioners refuse to produce any responsive document on the basis of a claim of privilege, Respondent proposes that User and Retailer Petitioners be required to identify the date, author, addressee, persons receiving copies, type of document or information (letter, report, memorandum, etc.), title if any, description of the subject matter addressed in the document, number of pages, the specific privilege(s) claimed and the factual basis therefore. If any document responsive to a document request was, but is no longer in User and Retailer Petitioners' possession, custody or control, or was known to User and Retailer Petitioners but is no longer in existence, Respondent proposes that User and Retailer Petitioners be required to state what disposition was made of it or what became of it.

III. Deferral of Interrogatories

Respondent expects that interrogatories of opposing witnesses will be needed unless there is an agreement between the parties or an order of the ALJ providing for the exchange of written direct testimony (or possibly other documents fully describing the scope and substance of the witnesses' expected testimony) at least three weeks before witnesses are scheduled to testify. The parties are presently discussing this matter, so Respondent proposes to defer any request for interrogatories at this time, but respectfully reserves the right to move for additional discovery in the event that neither an agreement between the parties nor a ruling by the ALJ appears likely to provide Respondent adequate and timely detail as to the scope and substance of witnesses' expected testimony.

IV. Conclusion

For the reasons specified above, the information Respondent seeks by this motions for additional discovery is not otherwise obtainable and has significant probative value in this proceeding. Respondent's motion for additional discovery will not necessarily delay the proceeding, because both User and Retailer Petitioners' compliance with the additional discovery order and Respondent's review of the discovery products can proceed in parallel with other hearing preparation activities. Moreover, as no schedule has been set for the next steps in this proceeding, there are no proximate events or deadlines that could be delayed. Finally, even if the proposed additional discovery were to cause a delay, such delay would be reasonable given the relevance of the information sought to the merits of this case.

For the reasons presented above, Respondent's proposed document discovery will not unreasonably delay the proceeding, and seeks information that is not otherwise obtainable and has significant probative value to this proceeding. Accordingly, Respondent's motion for additional discovery meets the criteria of 40 C.F.R. § 164.51(a) and (c), and should be granted.

Respectfully submitted,

May 5, 2014
Date

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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of *Respondent's Motion For Additional Discovery of Petitioners Louisville Apartment Association, Greater Cincinnati Northern Kentucky Apartment Association, and Do It Best Corporation* were filed with the Headquarters Hearing Clerk, and a copy hand delivered to the office of:

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