

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

In the Matter of:)
) FIFRA Docket No. 661
Reckitt Benckiser LLC, *et al.*)
)

RESPONDENT-INTERVENORS' MOTION FOR ADDITIONAL DISCOVERY

Respondent-Intervenors¹ move for limited additional discovery relating to the costs and benefits of the twelve rodenticide products (Affected Products) manufactured by Petitioner Reckitt Benckiser LLC (Petitioner or Reckitt) that EPA has proposed to cancel.² Although Reckitt contests EPA's determination that the Affected Products cause unreasonable adverse effects to humans and the environment, Reckitt has not disclosed certain nonpublic information that "has significant probative value," 40 C.F.R. § 164.51, to a cost-benefit analysis of the proposed cancellation. The central purpose of discovery rules is to "avoid surprise and the possible miscarriage of justice." *Brown Badgett, Inc. v. Jennings*, 842 F.2d 899, 902 (6th Cir. 1988). To avoid such unfair surprise at the hearing, Respondent-Intervenors seek additional discovery as reflected in the attached proposed Requests for Production and Interrogatories.

¹ West Harlem Environmental Action (WE ACT) and Natural Resources Defense Council (NRDC) (collectively, Respondent-Intervenors).

² EPA's February 5, 2013 Notice of Intent to Cancel sets forth the twelve Reckitt products subject to cancellation. *See* Rodenticides; Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products, 78 Fed. Reg. 8123 (Feb. 5, 2013) [hereinafter NOIC]. EPA has proposed to cancel the Affected Products because they fail to conform to the safety requirements set forth in the agency's 2008 Risk Mitigation Decision (2008 RMD). *See* EPA, Statement of Reasons and Factual Basis for Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products 10-11 (Jan. 29, 2013) [hereinafter EPA Statement of Reasons]; EPA, Risk Mitigation Decision for Ten Rodenticides (May 28, 2008).

Respondent-Intervenors have consulted with the other parties regarding this motion. EPA, American Bird Conservancy, Center for Biological Diversity, Defenders of Wildlife, and Sierra Club do not oppose this motion. The Louisville Apartment Association, Greater Cincinnati Northern Kentucky Apartment Association, and Do It Best Corp. take no position on this motion. Respondent-Intervenors have conferred and shared these requests with Reckitt. Reckitt intends to file a response to this motion. Respondent-Intervenors will continue to consult with Reckitt and will file prompt notification if the parties reach an agreement on the production of any of the information requested here.

I. BACKGROUND

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes EPA to issue a notice of intent to cancel a pesticide's registration if the pesticide, "when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment." 7 U.S.C. § 136d(b). Under FIFRA, "[t]he term "unreasonable adverse effects on the environment" means . . . any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *Id.* § 136(bb). In challenging EPA's determination that the Affected Products "cause unreasonable adverse effects on the environment," NOIC, 78 Fed. Reg. at 8125, Reckitt has put in dispute the relative costs and benefits associated with continued use of those products. *See generally* Request for Hearing and Statement of Objections of Reckitt Benckiser LLC 22-27, 45-47 (Mar. 6, 2013) [hereinafter Reckitt Statement of Objections].

Reckitt maintains that EPA understates the economic and social costs of the proposed cancellation, particularly in light of the purportedly inferior rodent control alternatives that would remain available to consumers if the cancellation were to proceed. *See* Reckitt Statement

of Objections 22-25. Reckitt represents that its “d-CON brand consumer-use rodenticide products are among the most effective and most widely used consumer-use rodenticides,” *id.* at 24, and claims that the NOIC would “replace them with products that are less effective, potentially more hazardous, . . . and more costly,” *id.* at 25. In addition, Reckitt and its experts assert that EPA underestimates the public health risks associated with consumers’ reliance on alternative products. *See, e.g., id.* at 36-37. Accordingly, Reckitt insists, cancellation of the Affected Products will deprive consumers, especially those from low-income and minority communities, of safe, affordable, and effective means of rodent control. *See id.* at 22-26, 46-47.

Although Reckitt has produced a number of documents in support of its position, it has not disclosed certain critical information that bears directly on how the proposed cancellation will impact consumers. For example, Reckitt suggests that the proposed cancellation will leave consumers without an adequate suite of chemical rodenticide products, which, according to Reckitt, are critical to controlling larger rodent infestations. EPA has, however, indicated that there are currently more than 30 rodenticide products—including other Reckitt products—that conform to the 2008 RMD and are registered for general consumer use against commensal rodents. *See* EPA Statement of Reasons 108; EPA, *New, More Protective Rodenticide Bait Station Products*, <http://www.epa.gov/pesticides/mice-and-rats/rodent-bait-station.html> (last visited May 2, 2014). Reckitt has disclosed little information regarding these rodenticide products that conform to the 2008 RMD, including conforming products that Reckitt has registered. Reckitt has also declined to disclose information regarding some of its expert witnesses that bears directly on their credibility.

Respondent-Intervenors thus seek limited additional discovery to obtain this highly probative information.

II. DISCUSSION

Discovery rules “are designed to ‘make a trial less a game of blind man’s bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.’”

Midwestern Pet Foods, Inc. v. Societe des Produits Nestle S.A., 685 F.3d 1046, 1055 (Fed. Cir. 2012) (quoting *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958)). Here, the Rules of Practice authorize the Administrative Law Judge to permit further discovery upon a determination “(1) that such discovery shall not in any way unreasonably delay the proceeding, (2) that the information to be obtained is not otherwise obtainable and (3) that such information has significant probative value.” 40 C.F.R. § 164.51. These conditions are satisfied with respect to the limited additional discovery that Respondent-Intervenors seek. Granting the requested discovery would, moreover, facilitate fairness and eliminate surprise at the hearing.

A. The Requested Information Has Significant Probative Value

“The phrase ‘probative value’ denotes the tendency of a piece of information to prove a fact that is of consequence in the case.” *In re Advanced Elecs., Inc.*, 10 E.A.D. 385 (2002). Respondent-Intervenors seek additional discovery on information that has a significant tendency to prove facts relating to a central issue in this case: the impact of the proposed cancellation on consumers, including whether consumers will have access to safe, affordable, and effective rodent controlling alternatives following the cancellation.

1. Efficacy, price, availability, and safety of alternative rodent control products (RFPs 1-9; Interrogs. 1-6, 12)

Reckitt claims that cancellation of the Affected Products would deprive consumers of affordable and effective rodent control alternatives. *See* Reckitt Statement of Objections 22-26. Although Petitioner acknowledges that mechanical rodent control devices and rodenticide products that conform to the 2008 RMD will continue to be available to consumers after the

proposed cancellation, it claims that these products are more expensive and less effective than the Affected Products—a characterization with which EPA and Respondent-Intervenors disagree. Price and efficacy are likely important factors in consumers' purchasing decisions with respect to alternative rodent control products. Accordingly, information on these issues has significant probative value as to whether the proposed cancellation would negatively impact consumers.

In addition, with respect to chemical rodent controls available to consumers following the proposed cancellation, Reckitt has registered at least eight rodenticide products that conform to the 2008 RMD. *See* EPA, *New, More Protective Rodenticide Bait Station Products*, <http://www.epa.gov/pesticides/mice-and-rats/rodent-bait-station.html> (last visited May 2, 2014). As of April 2013, however, Reckitt had not yet made these products available for purchase by consumers. *See id.* To the extent that Petitioner has registered conforming products but chosen not to market them, information on its reasons for doing so are highly probative as to the company's ability to furnish commercially viable alternatives to the Affected Products.

In addition to arguing that EPA has overestimated the cost and effectiveness of alternative rodent control products, Reckitt and its experts also maintain that the agency underestimated the health risks associated with use of those alternatives. *See, e.g.*, Reckitt Statement of Objections 28 (“[S]nap traps and glue traps present a number of risks to children who encounter them, including injuries from fingers being caught in a snap trap . . .”). Of particular relevance here, Dr. James McCluskey has made an unsupported “assum[ption] that the vast majority of incidents related to rat trap closure on children’s fingers requires some type of emergent care.” PRX 2-22, at 13. Respondent-Intervenors seek additional discovery on the basis for Dr. McCluskey’s assumption, as this information has significant probative value as to the

health risks associated with snap traps, an alternative to the Affected Products that will remain available to consumers following the proposed cancellation.

2. Rodent control needs and decision-making in the residential context (RFPs 10-14, 16; Interrogs. 13-18)

Respondent-Intervenors also seek additional discovery on the selection and application of rodent control products in the residential context. This information has significant probative value as to how residential consumers would address rodent problems following cancellation of the Affected Products—a question that bears critically on whether the cancellation would contribute, as Reckitt argues, to an increase in rodent infestations and related public health risks, *see* Reckitt Statement of Objections, 36-37.

Reckitt and its experts suggest that the need for chemical rodent controls (such as the Affected Products) depends in part on the scale of rodent problems, and that larger infestations cannot be managed through the use of traps alone. *See, e.g.*, PRX 2-22, at 13. Information on the magnitude of rodent infestations thus has significant probative value as to the extent to which mechanical rodent control devices would serve as adequate substitutes for the Affected Products. Likewise, information on the degree to which residents are able to avoid larger infestations by, for example, controlling rodent entry into their residences, is significantly probative as to consumers' ability to address rodent problems without using the Affected Products or other chemical controls.

In addition, Respondent-Intervenors seek information on factors that influence consumer behavior with respect to selection and application of rodent control products. This information has significant probative value as to how residential consumers would adjust their approaches to rodent problems following cancellation of the Affected Products. Information on consumer sensitivity to product prices would, for example, shed light on whether price increases would

deter consumers from buying particular rodent control products or from buying rodent control products altogether.

Reckitt also contends that consumers are likely to misuse products that conform to the 2008 RMD by deploying bait blocks without bait stations. *See* Reckitt Statement of Objections 28. Respondent-Intervenors seek additional discovery on the likelihood of this kind of misuse, which has significant probative value as to whether cancellation of the Affected Products would achieve the intended objective of decreasing accidental exposures to rodenticides and the healthcare, economic, and social costs associated with those exposures.

One of Reckitt's experts has, moreover, analyzed the incremental costs associated with the proposed cancellation by constructing a model that "relies on a number of assumptions." PRX 544, at 26. One of these assumptions is that consumers would employ only single-use bait station products rather than refillable bait station products. PRX 544, at 26-27. Respondent-Intervenors seek the "sensitivity analysis" that underlies this assumption, as it has significant probative value as to the economic impact of the proposed cancellation, insofar as single-use bait station products are more expensive than their refillable counterparts.

In addition, to the extent that residential rodent control decisions are made not only by individual residents, but also by pest control professionals and building managers and owners, information on the selection and application of rodent control products by those individuals is likewise significantly probative as to how residential rodent control strategies would change in response to the proposed cancellation. Furthermore, insofar as pest control professionals already rely on alternatives to the Affected Products, any information Reckitt has on their ability to manage residential rodent problems—including larger infestations—has significant probative

value as to whether effective control of those problems could be achieved without use of the Affected Products.

**3. Credibility of Reckitt's experts
(RFPs 15, 17; Interrogs.7-9)**

The Environmental Appeals Board (EAB) recognized that information relating to witness credibility can have significant probative value that justifies additional discovery. *See, e.g., In the Matter of Tiger Shipyard, Inc.*, CERCLA 106(B) Petition No. 96-3, 1999 WL 1631889 (granting in part a motion for the production of impeaching evidence based on the 40 C.F.R. § 22.19(f) “further discovery” standard); *see also* 40 C.F.R. § 22.19(f) (authorizing additional discovery under a standard closely resembling the standard for additional discovery set forth in 40 C.F.R. § 164.51). In *Tiger Shipyard*, for example, the EAB granted additional discovery on factors that may have influenced a party’s witnesses to testify; the EAB also authorized additional discovery on whether these witnesses had made prior oral or written statements that diverged from their expected testimony. *See* 1999 WL 1631889, at *4.

A number of Reckitt’s experts will be testifying about the proposed cancellation’s likely impact on consumers, a central disputed issue in this case. However, the record currently contains little information upon which Respondent-Intervenors can rely to assess the expected testimony and credibility of some of these experts. For example, Reckitt has not disclosed relevant publications for Dr. Edwin Tinsworth and Mr. Vincent Ford. Neither has Reckitt disclosed the compensation that its experts will be receiving for their participation in this case, which bears critically on “interest, motive, or bias.” *Tiger Shipyard*, 1999 WL 1631889, at *4. The credibility and credentials of Reckitt’s experts have significant probative value as to the disputed facts (regarding the costs and benefits of the proposed cancellation) on which they will be testifying.

4. Credibility of Reckitt's fact witnesses (Interrogs. 9-10)

Reckitt has disclosed a fact witness, Pastor Robert Jones, to testify on “the impact of EPA’s proposed cancellation action on low-income and minority communities.” Petitioner’s Report of Prehearing Exchange 8. Other than listing Pastor Jones’ affiliation with the Oak Park United Methodist Church and the California Association of Black Pastors, however, Petitioner disclosed no information about this witness in its prehearing exchange. To avoid surprise at trial, Respondent-Intervenors seek additional discovery on the facts to which Pastor Jones will be testifying. This information has significant probative value as to how the proposed cancellation will impact environmental justice communities. Respondent-Intervenors also seek information on the financial relationships between Reckitt and Pastor Jones and the pastor’s institutional affiliates, as this information has significant probative value as to Pastor Jones’ credibility.

B. Additional Discovery Will Not Unreasonably Delay the Proceeding

An order for additional discovery would not unreasonably delay the hearing, which has yet to be scheduled; there are no pending deadlines that would be affected. *See In re City of Bedford*, No. CWA-01-2002-0059, 2003 WL 21693598, at *3 (July 2, 2003) (“The information will not unreasonably delay the proceeding or burden the non-movant because the Court has not set a hearing date.”). Furthermore, review of any of the requested documents could proceed concurrently with other hearing preparation.

In addition, Respondent-Intervenors are seeking information that Reckitt is already likely to maintain in the normal course of business—including information about the safety, efficacy, and price of Reckitt and competitor rodent control products, as well as information about consumer rodent control needs and decision-making—given the obvious relevance of this information to business strategy. *See id.* (“[I]t is reasonable to assume that the information is in

the possession of the Respondent because the information sought is the type kept in the ordinary course of business.”). Accordingly, the time to compile those requested documents should not be excessive. Neither should the requested background information about Reckitt’s witnesses, nor the company’s financial relationships to those witnesses, require undue amounts of time to obtain.

C. The Requested Information Is Not Otherwise Obtainable

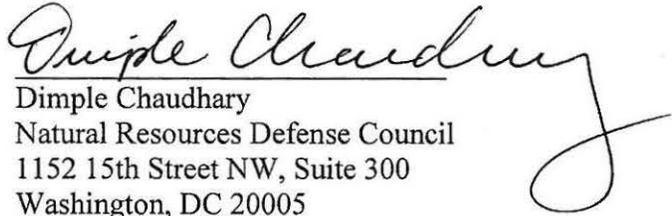
The requested information is not publically available. In particular, some of the information relating to consumer needs and behavior may constitute confidential business information, as may some of the information relating to the safety, efficacy, and price of rodent control products manufactured by Reckitt and its competitors. Nor are Respondent-Intervenors privy to information relating to the credentials and backgrounds of Reckitt’s witnesses and the financial relationships between Reckitt and its witnesses. Respondent-Intervenors are thus unable to obtain the requested information without additional discovery.

* * *

In light of the forgoing, Respondent-Intervenors respectfully request the Administrative Law Judge to grant their motion for additional discovery, allowing Respondent-Intervenors to serve the attached Requests for Production and Interrogatories upon Petitioner and requiring Petitioner to produce the requested information.

In addition, Respondent-Intervenors respectfully reserve the right to move for additional discovery in the event that written direct testimony (or other documents fully setting forth the scope, substance, and basis for each witness’ expected testimony) are not disclosed at least four weeks prior to the hearing.

Respectfully submitted,



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Counsel for NRDC and WE ACT

Dated: May 5, 2014

3. Insofar as Petitioner has already produced any of the requested documents, Petitioner is requested to identify those documents by exhibit number.

4. For each document produced in response to a Request for Production, Petitioner is requested to indicate on the document, or in some other reasonable manner, the numbered Request for Production, as well as any numbered Interrogatory, to which that document responds.

5. If any document cannot be produced in full, Petitioner is requested to produce it to the fullest extent possible, indicating what information is being withheld and the reason why that information is being withheld.

6. If the response to any of the following Requests for Production would require the production of additional documents in order to be complete, comprehensible, or non-misleading, Petitioner is requested to produce such additional documents as are necessary.

DEFINITIONS

For the purposes of these Requests for Production of Documents, the following terms have the following meanings:

1. “Reckitt” means Reckitt Benckiser, LLC and any subsidiaries, parents, divisions, departments, branches, affiliates, predecessors, successors, or offices of Reckitt Benckiser, LLC; any corporate predecessor or successor thereof; all present and former officers, directors, employees, trustees, principals, agents, and representatives of Reckitt; and any person acting or purporting to act on Reckitt’s behalf.

2. “Affected Product” means the twelve Reckitt rodenticide products subject to cancellation, as set forth in the Notice of Intent to Cancel issued by the U.S. Environmental Protection Agency (EPA). *See* Rodenticides; Notice of Intent to Cancel Registrations of, and

Notice of Denial of Applications for, Certain Rodenticide Bait Products, 78 Fed. Reg. 8123, 8123 (Feb. 5, 2013).

3. “Rodenticide” means any pesticide intended for preventing, destroying, repelling, or mitigating rodents. *Cf.* 7 U.S.C. § 136 (defining “pesticide”). “Rodenticide product” means any product that contains a rodenticide.

4. “Mechanical rodent control device” means any device, including but not limited to snap traps and glue boards, that uses only physical or mechanical means to trap, destroy, repel, or mitigate rodents and that does not include any rodenticide. If a mechanical rodent control device and rodenticide are packaged together, that combined product is a rodenticide product.

5. “Rodent control” means the prevention, destruction, repellence, or mitigation of rodents. “Rodent control products” include both rodenticide products and mechanical rodent control devices.

6. “Registered” means registered with EPA under the Federal Fungicide, Insecticide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*

7. “Conforming Products” means rodenticide products for commensal rodent control registered by Reckitt that conform to the criteria set forth in EPA’s 2008 Risk Mitigation Decision (2008 RMD). *See* Risk Mitigation Decision for Ten Rodenticides (May 28, 2008). Conforming products include but are not limited to: (a) d-Con Bait Station XIV (EPA Registration No. 3282-100); (b) d-Con Bait Station XIII (EPA Registration No. 3282-101); (c) d-Con Bait Station XI (EPA Registration No. 3282-102); (d) d-Con Bait Station XII (EPA Registration No. 3282-103); (e) d-Con Hideaway d-Con Bait Shield VII (EPA Registration No. 3282-96); (f) d-Con Corner Fit d-Con Bait Shield VIII (EPA Registration No. 3282-97); (g) d-Con Bait Station X (EPA Registration No. 3282-98); and (h) d-Con Bait Station IX (EPA

Registration No. 3282-99). See EPA, *New, More Protective Rodenticide Bait Station Products*, <http://www.epa.gov/pesticides/mice-and-rats/rodent-bait-station.html> (last visited May 1, 2014).

8. “Document” means any kind of written, graphic, or recorded matter, however produced or reproduced, including drafts, originals, non-identical copies, and information stored electronically, magnetically, photographically, or otherwise. Documents include but are not limited to writings, correspondence, records, memoranda, letters, photographs, messages, reports, notes, e-mails, other electronic recordings, compilations or recordings of words or data, studies, analyses, books, records, tapes, or other forms of recordings of any kind from which information can be obtained and translated if necessary.

9. “And” and “or” shall be construed in the conjunctive or disjunctive, whichever makes the request more inclusive in context.

10. “Concerning” means and includes the following terms: regards, describes, involves, compares, correlates, mentions, connected to, refers to, pertains to, relates to, contradicts, or comprises.

REQUEST FOR PRODUCTION OF DOCUMENTS

Pursuant to 40 C.F.R. § 164.51, WE ACT and NRDC, Respondent-Intervenors in *In the Matter of Reckitt Benckiser LLC, et al.*, FIFRA Docket No. 661, request that Petitioner produce:

1. All documents identified in response to Respondent-Intervenors’ First Set of Interrogatories to Petitioner Reckitt Benckiser, LLC.
2. All documents concerning the rodent control efficacy of any Conforming Product.
3. All documents concerning the rodent control efficacy of any mechanical rodent control device presently available for sale.

4. All documents concerning the comparative rodent control efficacy of any Affected Product and any Conforming Product.
5. All documents concerning the comparative rodent control efficacy of any Affected Product and any mechanical rodent control device.
6. All documents concerning any decision by Reckitt to make available for sale, or to decline to make available for sale, any Conforming Product.
7. All documents concerning the pricing (current or projected) of any Conforming Product.
8. All documents concerning the pricing of any Affected Product as compared to the pricing (current or projected) of any Conforming Product.
9. All documents concerning the pricing of any Affected Product as compared to the pricing (current or projected) of any mechanical rodent control device.
10. All documents concerning the selection and application of rodent control products (including mechanical rodent control devices) by residential consumers, including but not limited to any research, questionnaires, surveys, and studies.
11. All documents concerning selection and application of rodent control products (including mechanical rodent control devices) by owners or managers of multi-unit housings or dwellings, including but not limited to any research, questionnaires, surveys, and studies.
12. All documents concerning selection and application of rodent control products (including mechanical rodent control devices) in residential settings by pest control operators or professionals, including but not limited to any research, questionnaires, surveys, and studies.
13. All documents concerning (a) any increases in pricing for rodenticide products that may arise from conformance to the 2008 RMD, and (b) any impacts that those price increases

may have on the use of rodent control products (including mechanical rodent control devices) by residential consumers.

14. All documents concerning the likelihood that residential consumers would misuse rodenticide products that conform to the 2008 RMD by deploying bait blocks without bait stations.

15. All documents concerning any communications between Reckitt or its counsel and the following of its expert witnesses relating to (i) compensation for an expert's study or testimony; (ii) facts or data that Reckitt's counsel provided that an expert considered in forming the opinions to be expressed; and (iii) assumptions that Reckitt's counsel provided and that an expert relied on in forming the opinions to be expressed, *see* Fed. R. Civ. P. 26(b)(4)(C):

- a. Dr. James McCluskey;
- b. Dr. Alan Buckle;
- c. Dr. Colin Prescott;
- d. Dr. Robin Cantor;
- e. Dr. Brad Gessner;
- f. Dr. Carolyn Meyer;
- g. Dr. Edwin Tinsworth;
- h. Mr. Hal Ambuter;
- i. Ms. Christina Scharer;
- j. Mr. Vincent Ford; and
- k. Mr. Forrest St. Aubin.

These include, but are not limited to, documents concerning any financial relationships between Reckitt and its witnesses.

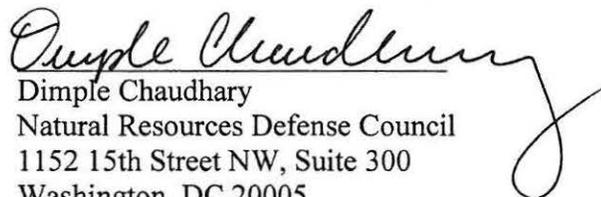
16. The "sensitivity analysis" referenced in footnote 40 on page 27 of PRX 544.

17. The following publications and major presented papers by Mr. Forrest St. Aubin, *see* PRX 581:

- a. January 1963. *3 Simple Steps [to] Control Rodents*. Food Engineering Magazine.
- b. 1989. *Pest Management in Health Care Facilities*. Technical Information Manual #20. Armed Forces Pest Management Board, Department of Defense.

- c. May and June 1990. *Pest Management in Supermarkets*. Pest Control Magazine.
- d. June, July and August 1991. *Pest Management in Nursing Homes*. Pest Control Magazine.
- e. Choosing the Right Formulation for the Right Job. Symposium on Pest Control for Health Care Managers, Vanderbilt University, Nashville, Tennessee, 1981.
- f. Trends in Insect and Rodent Control. Four-State Food Sanitation Symposium (under auspices of Missouri Health Department), Lake Ozark, Missouri, 1989.
- g. PCO's [sic] and Public Health. Annual Missouri Milk, Food and Environmental Health Association, Columbia, Missouri, 1989.
- h. Advances in Rodent Control, Metro Chapter, Food and Drug Officials, Kansas City, Kansas, 1989.
- i. Integrated Pest Management in the Food Processing and Health Care Setting. Food and Drug Administration, Kansas City, Missouri. September, 1990.
- j. Non-Traditional Pest Management Methods. Annual Meeting of the Missouri Pest Control Association, Columbia, Missouri, October, 1991.
- k. Non-Traditional Pest Management Methods. Annual Meeting of the Kansas Termite and Pest Control Association, Wichita, Kansas. December, 1991.
- l. Non-Traditional Pest Management Methods. Iowa State University, Ames, Iowa. March, 1992.
- m. Non-Traditional Pest Management Methods. Illinois Pest Control Association, Peoria, Illinois. October, 1992.
- n. Non-Traditional Pest Management Methods. Annual Meeting of the Missouri Pest Control Association, Branson, Missouri. November, 1992.

Respectfully submitted,



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Counsel for NRDC and WE ACT

Dated: May 5, 2014

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

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Reckitt Benckiser LLC, *et al.*)
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**RESPONDENT-INTERVENORS' FIRST SET OF INTERROGATORIES TO
PETITIONER RECKITT BENCKISER, LLC**

Propounding Parties: West Harlem Environmental Action (WE ACT); Natural Resources
Defense Council (NRDC) (together, Respondent-Intervenors)

Responding Party: Reckitt Benckiser, LLC (Petitioner or Reckitt)

INSTRUCTIONS

1. Petitioner is requested to respond within 30 days after the ALJ's order granting this motion for discovery, or by such other time as the ALJ considers appropriate.
2. If, in answering an interrogatory, Petitioner claims any ambiguity in either the request or a definition or instruction applicable thereto, Petitioner is requested to identify in the response the language that Petitioner considers ambiguous or vague and to state the interpretation Petitioner is using in responding to the request.

DEFINITIONS

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2. "Affected Product" means the twelve Reckitt rodenticide products subject to cancellation, as set forth in the Notice of Intent to Cancel issued by the U.S. Environmental Protection Agency (EPA). *See* Rodenticides; Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products, 78 Fed. Reg. 8123, 8123 (Feb. 5, 2013).

3. "Rodenticide" means any pesticide intended for preventing, destroying, repelling, or mitigating rodents. *Cf.* 7 U.S.C. § 136 (defining "pesticide"). "Rodenticide product" means any product that contains a rodenticide.

4. "Mechanical rodent control device" means any device, including but not limited to snap traps and glue boards, that uses only physical or mechanical means to trap, destroy, repel, or mitigate rodents and that does not include any rodenticide, including but not limited to snap traps and glue boards. If a mechanical rodent control device and rodenticide are packaged together, that combined product is a rodenticide product.

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6. "Registered" means registered with EPA under the Federal Fungicide, Insecticide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 *et seq.*

7. "Conforming Products" means rodenticide products for commensal rodent control registered by Reckitt that conform to the criteria set forth in EPA's 2008 Risk Mitigation

Decision (2008 RMD). *See* Risk Mitigation Decision for Ten Rodenticides (May 28, 2008).

Conforming products include but are not limited to: (a) d-Con Bait Station XIV (EPA Registration No. 3282-100); (b) d-Con Bait Station XIII (EPA Registration No. 3282-101); (c) d-Con Bait Station XI (EPA Registration No. 3282-102); (d) d-Con Bait Station XII (EPA Registration No. 3282-103); (e) d-Con Hideaway d-Con Bait Shield VII (EPA Registration No. 3282-96); (f) d-Con Corner Fit d-Con Bait Shield VIII (EPA Registration No. 3282-97); (g) d-Con Bait Station X (EPA Registration No. 3282-98); and (h) d-Con Bait Station IX (EPA Registration No. 3282-99). *See* EPA, *New, More Protective Rodenticide Bait Station Products*, <http://www.epa.gov/pesticides/mice-and-rats/rodent-bait-station.html> (last visited May 1, 2014).

8. “Evidence” has the meaning of that word in Federal Rule of Evidence 401, and includes without limitation and without regard to admissibility, documents, other writings, physical things, and testimony or potential testimony of any witness or potential witness.

9. “And” and “or” shall be construed in the conjunctive or disjunctive, whichever makes the request more inclusive in context.

10. “Concerning” means and includes the following terms: regards, describes, involves, compares, correlates, mentions, connected to, refers to, pertains to, relates to, contradicts, or comprises.

INTERROGATORIES

1. Identify all Conforming Products that Reckitt has made available for sale to consumers.

2. Identify all Conforming Products that Reckitt has registered but has not made available for sale to consumers.

3. PRX 420 identifies a product with the EPA Registration number of 7173-236-3282 that does not conform to the 2008 RMD. Describe the current registration status of that product.

4. Identify the twelve Affected Products among the rodenticide bait products listed in PRX 465.

5. Identify the single-use traps listed in PRX 465.

6. Identify the reusable traps listed in PRX 465.

7. List all publications authored by the following expert witnesses in the previous 10 years, *cf.* Fed. R. Civ. P. (a)(2)(B)(iv):

- a. Dr. Edwin Tinsworth; and
- b. Mr. Vincent Ford.

8. List all other cases in which, during the previous four years, the following witnesses testified as experts at trial or by deposition, *cf.* Fed. R. Civ. P. (a)(2)(B)(v):

- a. Dr. James McCluskey;
- b. Dr. Alan Buckle;
- c. Dr. Colin Prescott;
- d. Dr. Robin Cantor;
- e. Dr. Brad Gessner;
- f. Dr. Carolyn Meyer;
- g. Dr. Edwin Tinsworth;
- h. Mr. Hal Ambuter;
- i. Ms. Christina Scharer;
- j. Mr. Vincent Ford; and
- k. Mr. Forrest St. Aubin

9. Describe the compensation to be paid to each of the following witnesses for the study and testimony in this case, *cf.* Fed. R. Civ. P. (a)(2)(B)(vi):

- a. Dr. James McCluskey;
- b. Dr. Alan Buckle;
- c. Dr. Colin Prescott;
- d. Dr. Robin Cantor;
- e. Dr. Brad Gessner;
- f. Dr. Carolyn Meyer;
- g. Dr. Edwin Tinsworth;

- h. Mr. Hal Ambuter;
- i. Ms. Christina Scharer;
- j. Mr. Vincent Ford; and
- k. Mr. Forrest St. Aubin

10. Describe all financial relationships, including but not limited to donations, gifts, payments, stipends, and sponsorships, between Reckitt and:

- a. Pastor Robert Jones;
- b. the Oak Park United Methodist Church in Sacramento, California; and
- c. the California Association of Black Pastors.

11. Describe all facts that Reckitt expects Pastor Robert Jones to present that support the assertion that cancellation of the affected products would have detrimental effects on low-income and minority communities.

12. Page 14 of PRX 2-22 (James McCluskey, *Analysis of the Human Health Effects of Rodenticides and Response to the 2011 Draft Notice of Intent to Cancel and Denial*) states Dr. McCluskey's "belie[f]" that "it is fair to assume that the vast majority of incidents related to rat trap closure on children's fingers require some type of emergent care." Identify all evidence that supports this belief.

13. Page 13 of PRX 2-22 states, "[M]ost rodent 'infestations' occur in farm/rural settings, and inner-city neighborhoods. While it is mentioned that many residential rodent problems can be adequately controlled with the use of traps, the key word in this equation is 'suburban'. In suburban situations where there is a single rodent in a home, trapping is most likely adequate. However, the situation in urban settings is quite different and deserves discussion. Urban housing, particularly public housing is a hotspot for rodent infestation problems."

- a. Define "infestations."
- b. Describe the proportion of residential rodent problems that are comprised of "infestations" that cannot be effectively controlled through the use of traps.

- c. Identify all evidence concerning the proportion of residential rodent problems that are comprised of “infestations” that cannot be effectively controlled through the use of traps.

14. Page 13 of PRX 2-22 states the following: “[O]ccupants [of urban housing] . . . have no control over general building conditions . . . [and] openings in the building envelope that permit rodent entry”

- a. Describe all evidence, and identify all exhibits showing, that occupants of urban housing have control over conditions that permit rodent entry into their buildings and individual residential units.
- b. Describe all evidence, and identify all exhibits showing, that occupants of urban housing lack control over conditions that permit rodent entry into their individual residential units.

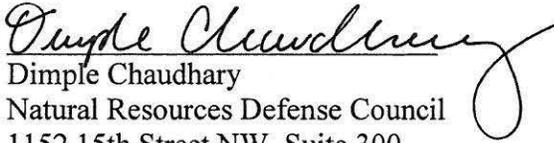
15. Page 21 of PRX 2-71 (Alan Buckle, *Comparative Efficacy of Rodenticides*) states that “most professional applicators apply rodenticide baits in preventative (or maintenance) rodent control programs” and that “[u]sually these treatments do not involve actual infestations but are merely applied to prevent rodent ingress.” Identify all evidence that supports these statements.

16. Identify all evidence that supports the assertion that the increased cost of rodenticide products that conform to the 2008 RMD will lead some residential consumers to abandon rodent control efforts entirely. *See* Request for Hearing and Statement of Objections of Reckitt Benckiser LLC 25.

17. Identify all evidence that supports the assertion that the increased cost of rodenticide products that conform to the 2008 RMD will lead some residential consumers to deploy unprotected bait blocks. *See id.* at 28.

18. Identify all evidence that support the assertion that few residential consumers use mechanical rodent control devices effectively. *See* PRX 2-71, at 25.

Respectfully submitted,



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Counsel for NRDC and WE ACT

Dated: May 5, 2014

CERTIFICATE OF SERVICE

I certify that, on this 5th day of May, 2014, the foregoing document was served to the addresses listed below in the manner indicated.

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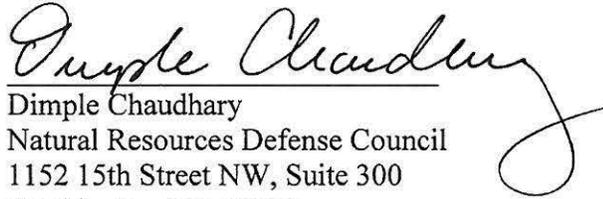
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