

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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2013 DEC -6 PM 1:40

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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 )  
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FIFRA Docket No. 661

RESPONSE TO NOTICE OF RECEIPT OF EX PARTE CORRESPONDENCE

Counsel for the Office of Chemical Safety and Pollution Prevention (Respondent) has been asked by other offices in EPA, including EPA's Office of Congressional and Intergovernmental Relations (OCIR), to provide the Presiding Officer and the parties to this proceeding with certain information in response to the Notice of Receipt of Ex Parte Correspondence dated November 5, 2013. While this is an unusual situation, we believe it appropriate to submit the following information in order to demonstrate to the Presiding Officer and the parties that appropriate procedures are in place to avoid *ex parte* communications prohibited under 40 CFR § 164.7 and that, with respect to the transmittal of the letter from Senator Stabenow to the Office of the Administrative Law Judges, the persons involved in that transmittal were not "connected with the preparation or presentation of the proceeding as an advocate, or in an investigative or expert capacity, or with any representative of such person," and had no intent to in any way interfere with this proceeding or influence the Presiding Officer.

Around the time the Notice of Intent to Cancel was first issued in this proceeding, the attorneys who will be representing Respondent in this proceeding met with other attorneys in EPA's Office of General Counsel and with representatives from the Office of the Administrator to make sure that the Office of the Administrator was aware of the Administrator's potential adjudicatory role in the proceeding, and the dictates of Section 164.7.<sup>1</sup> This fall, after Gina McCarthy was confirmed as the new Administrator and Avi Garbow confirmed as the new General Counsel, similar meetings were held to assure that Administrator McCarthy and Mr. Garbow were aware of the Administrator's responsibilities with respect to this proceeding and *ex parte* contacts. No issues related to this proceeding were discussed in any of these meetings other than the need to insulate the Administrator from *ex parte* communications and procedures for doing so.

In order to avoid inappropriate *ex parte* contacts with other EPA staff, the Administrator and certain persons in the Office of the Administrator and the Office of General Counsel, have been identified as "adjudicators" for purposes of this proceeding.<sup>2</sup> The litigating portion of the Agency in this proceeding, including hearing counsel and the Office of Chemical Safety and Pollution Prevention, has been instructed to refrain from discussing the proceeding with those who have been designated as "adjudicators." In addition, in order to minimize the risk of *ex parte* communications from other sources, the "adjudicators" in the Administrator's Office have been given a list of persons who might have an interest in the outcome of the case (including the parties and *amici*, other registrants of rodenticide products, and public interest groups who have

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<sup>1</sup> Although Part 164 does not assign the Administrator routine adjudicatory responsibilities in a cancellation proceeding, §164.2(g) provides that the Environmental Appeals Board may at its discretion refer an appeal or a motion to the Administrator.

<sup>2</sup> The Office of Administrative Law Judges and the Environmental Appeals Board and its staff are also considered adjudicators.

demonstrated interest in this matter), so that proper care could be taken if the Administrator or another of the “adjudicators” ever meets with such interested persons. Certain attorneys in the Office of General Counsel were identified as “adjudicators” in order that they could be available to assist the Administrator in regard to this proceeding if needed in the future. No person who has been connected with the Agency’s preparation for this proceeding has discussed the merits of this proceeding with those designated as “adjudicators,” and procedures have been put into place to avoid prohibited *ex parte* communications during the pendency of this matter.

With respect to the letter from Senator Stabenow appended to the November 5<sup>th</sup> Notice, an employee in OCIR, Mr. Sven-Erik Kaiser, was given the task of responding to Senator Stabenow’s letter. Neither Mr. Kaiser nor any other person in OCIR has been involved in any way with Respondent’s litigation efforts in this proceeding. Never having previously responded to a letter regarding the progress of an ongoing administrative adjudication, and in accordance with standard OCIR practice of informing EPA offices when responding to a congressional inquiry that touches on the activities of that office, Mr. Kaiser sent an e-mail to Mr. Bruce Franklin in the Office of Administrative Law Judges (OALJ) explaining that he was drafting a response to a letter “asking about the status of an ALJ case.” In that e-mail, Mr. Kaiser asked whether OALJ had “a standard response to folks asking about case status.” A few days later, Mr. Kaiser renewed his request in another e-mail and added: “If appropriate, I can draft a response and send over for you to look at – please let me know if your folks have any process concerns. I want to be careful about the [sic] maintaining the proper boundaries.” Mr. Franklin responded to Mr. Kaiser by explaining that OALJ did not have any standard response, “but I would appreciate it if you would send a draft of your response so that we could peruse it before distributing it to others.” Mr. Kaiser then drafted a response and sent it to Mr. Franklin, asking Mr. Franklin if he

had any standard language to be included, other edits, or any other concerns with the response. At the same time that he provided Mr. Franklin with his draft response, Mr. Kaiser also forwarded to Mr. Franklin a copy of the letter from Senator Stabenow, for which the response was drafted. Mr. Kaiser related to counsel for Respondent that his decision to forward this document was motivated by his prior experience, interacting with other EPA offices, that when the "incoming" inquiry is not enclosed along with the draft response prepared by OCIR, those other offices almost invariably follow up by requesting a copy of the inquiry from him.

OCIR has asked counsel for Respondent to inform the Presiding Officer that neither Mr. Kaiser nor anyone else in OCIR had any intention to influence this proceeding in any way, that OCIR regrets any misunderstanding, and that OCIR agrees that it will not in the future forward to the OALJ any Congressional correspondence OCIR may receive relating to pending administrative actions.

Respectfully submitted,

Dec. 6, 2013

Date



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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of *Response To Notice Of Receipt Of Ex Parte Correspondence* were filed with the Headquarters Hearing Clerk, and a copy hand delivered to the office of:

The Honorable Susan L. Biro  
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I further certify that true and correct copies were sent by first class mail and e-mail to:

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