



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

RECEIVED BY OALJ 2013 NOV -5 PM 2:45

In the Matter of:)
Reckitt Benckiser LLC, et al.,1) FIFRA Docket No. 661
Petitioners)

NOTICE OF RECEIPT OF EX PARTE CORRESPONDENCE

The office of the undersigned is in receipt of the attached one-page letter dated September 17, 2013, signed by U.S. Senator Debbie Stabenow and addressed to Gina McCarthy, Administrator of the U.S. EPA.

The rules of procedure that govern this proceeding, set forth at 40 C.F.R. Part 164 ("Rules") provide that "[a]ny memorandum or other communication addressed to the Administrator, the Environmental Appeals Board, the Presiding Officer, or the Administrative Law Judge during the pendency of the proceeding, and relating to the merits thereof, by or on behalf of any party, shall be regarded as an argument made in the proceeding." Id. The presiding Judge must file any ex parte communication with the OALJ Hearing Clerk and cause it to be served upon all parties to the proceeding, who will be permitted to respond. Id. Further, the rules prohibit the presiding Administrative Law Judge from ex parte discussions of the merits of the proceeding. 40 C.F.R. § 164.7.

Therefore, pursuant to 40 C.F.R. § 164.7, by its attachment hereto the letter is being served upon all parties to this proceeding. All parties shall have until December 6, 2013, to file a response if they so choose.

[Handwritten signature]
Susan L. Biro
Chief Administrative Law Judge

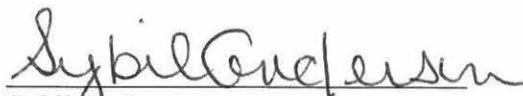
Dated: November 5, 2013
Washington, D.C.

1 The petitioners in this proceeding are Reckitt Benckiser LLC, Louisville Apartment Association, Greater Cincinnati Northern Kentucky Apartment Association, and Do it Best Corp.

In The Matter of Reckitt Benckiser LLC, et al., FIFRA Docket No. 661

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Notice of Receipt Of Ex Parte Correspondence**, dated November 5, 2013, was sent this day in following manner to the addresses listed below:



Sybil Anderson
Office of Administrative Law Judges
U.S. Environmental Protection Agency
(202)564-6261

Dated: **November 5, 2013**

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

Chief
Administrative Law Judge

MEMORANDUM

TO: Arvin Ganesan, Associate Administrator
Office of Congressional and Intergovernmental Relations
Mail Code 1301A
William Jefferson Clinton North

FROM: Susan L. Biro, Chief Administrative Law Judge
Office of Administrative Law Judges
Mail Code 1900R
Ronald Reagan Building, Room M1200 

SUBJECT: September 17, 2013 Letter to Administrator from Senator Debbie Stabenow

DATE: November 5, 2013

On November 4, 2013, the Office of Administrative Law Judges (OALJ) received a copy of a letter from Senator Debbie Stabenow, Chairwoman of the United States Senate Committee on Agriculture, Nutrition and Forestry, addressed to Gina McCarthy, Administrator of EPA, which had been forwarded by your office. The letter from Senator Stabenow, dated September 17, 2013, requests that Administrator McCarthy take necessary action to expedite a matter that is currently pending before OALJ, and specifically, pending before me: FIFRA Docket No. 661, *In the Matter of Reckitt Benckiser, LLC, et al.*

Congressional correspondence that concerns a case pending before me or another Administrative Law Judge may constitute *ex parte* communication relevant to the merits of a proceeding, which is prohibited by the Administrative Procedure Act (APA), 5 U.S.C. § 557(d), and may affect an Administrative Law Judge's ability to act fairly and impartially in the matter. The APA provides that in regard to hearings under section 556 of the APA, "no interested person outside the agency shall make or knowingly cause to be made to any member of the body comprising the agency, administrative law judge, or other employee who is or may reasonably be expected to be involved in the decisional process of the proceeding, an *ex parte* communication relevant to the merits of the proceeding." 5 U.S.C. § 557(d)(1)(A). Further, EPA's rules of procedure governing the FIFRA proceeding specifically prohibit an Administrative Law Judge from discussing *ex parte* the merits of a proceeding with "any party or with any person who has been 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.” 40 C.F.R. § 164.7. The rules also provide that “[a]ny memorandum or other communication addressed to the Administrator . . . during the pendency of the proceeding, and relating to the merits thereof, by or on behalf of any party, shall be regarded as an argument made in the proceeding.” *Id.* Such communications must be filed with the OALJ Hearing Clerk and served upon all parties to the proceeding, who will be permitted to respond. *Id.*

Decades ago, the U.S. Court of Appeals for the Fifth Circuit recognized that the intervention of Congress in a judicial function of a Federal executive agency created a “concern[] with the right of private litigants to a fair trial and, equally important, with their right to the appearance of impartiality, which cannot be maintained unless those who exercise the judicial function are free from powerful external influences.” *The Pillsbury Company v. FTC*, 354 F.2d 952, 964 (5th Cir. 1966). The D.C. Circuit Court has held similarly that congressional interference in the administrative process is of heightened concern in a quasi-judicial proceeding. *ATX, Inc. v. DOT*, 41 F.3d 1522, 1527 (D.C. Cir. 1994).

Indeed, an administrative adjudication “would be invalid if based in whole or in part on the pressures emanating from [a member of Congress].” *D.C. Fed’n of Civic Ass’ns v. Volpe*, 459 F.2d 1231, 1246 (D.C. Cir. 1971), cert. denied, 405 U.S. 1030 (1972); *Peter Kiewit Sons’ Co. v. U.S. Army Corps of Engineers*, 714 F.2d 163, 169 (D.C. Cir. 1983) (“pressure on the decisionmaker alone, without proof of effect on the outcome, is sufficient to vacate a decision”). Such congressional pressures may result from a congressional letter addressing the merits of a proceeding. *Koniag, Inc., Uyak v. Andrus*, 580 F.2d 601, 610 (D.C. Cir. 1978), cert. denied, 439 U.S. 1052 (1978) (congressional letter “compromised the appearance of the Secretary’s impartiality”); *ATX*, supra. The U.S. Court of Appeals for the Second Circuit has stated: “*Ex parte* communications by Congressmen or any one else with a judicial or quasi-judicial body regarding a pending matter are improper and should be discouraged,” and may require recusal of the adjudicator from a case “if the communications posed a serious likelihood of affecting the agency’s ability to act fairly and impartially in the matter before it.” *Power Auth. of the State of New York v. FERC*, 743 F.2d 93, 110 (2d Cir. 1984).

To avoid such *ex parte* communications, I request that your office avoid forwarding any further Congressional correspondence to OALJ regarding any pending administrative actions. To ensure that EPA does not withhold information from Congress (5 U.S.C. § 557(d)(2)), if you seek a response to an inquiry related to a pending proceeding before the OALJ in the future, it may be appropriate for your office to forward the Congressional correspondence to the appropriate Office of Regional Counsel, the Office of Enforcement and Compliance Assurance, the Office of General Counsel, or whatever attorney represents EPA in that particular proceeding. If, however, a member of Congress requests information specifically from the OALJ, it would be appropriate for your office to request such information in a letter from your office to OALJ. Then, once OALJ responds to your inquiry, your office may relay the information we provided to you to the inquiring member of Congress.

This constitutes the entirety of the OALJ response to your office's inquiry regarding the letter to Administrator McCarthy from Senator Stabenow dated September 17, 2013. Per the requirements of the APA, 5 U.S.C. § 557(d)(1)(C), and the rules governing the proceeding at issue, 40 C.F.R. § 164.7, I shall cause the copy of Senator Stabenow's letter received, and this response thereto, to be filed with the OALJ Hearing Clerk in FIFRA Docket No. 661, served upon all parties to that proceeding, and I will permit any party to the matter to file any response it deems appropriate. Further, I request that you include this Memorandum with your response to the Senator's correspondence.

DEBBIE STABENOW, MICHIGAN
CHAIRWOMAN

PATRICK J. LEAHY, VERMONT
TOM HARKIN, IOWA
MAX BAUCUS, MONTANA
SHERROD BROWN, OHIO
AMY KLOBUCHAR, MINNESOTA
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United States Senate

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AGRICULTURE, NUTRITION AND FORESTRY
WASHINGTON, DC 20510-6000
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September 17, 2013

The Honorable Gina McCarthy
Administrator
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Washington, DC 20460

Dear Administrator McCarthy:

I am writing to express my concern regarding an issue that I believe needs your immediate attention. In 2008, the EPA notified several pesticide manufacturers that it intended to permanently end the sale and distribution of certain rodenticide products. More recently, on February 5, 2013, the EPA published a final Notice of Intent to Cancel the registration of these rodenticide products in the Federal Register, citing several reasons, including "to protect children, pets, and non-target wildlife from unnecessary, unreasonable exposures to certain consumer-use rodenticides."

Since 2008, when the EPA initially issued a Risk Mitigation Decision ("RMD") to cancel these products, most manufacturers voluntarily amended their rodenticide products or registered new rodenticide products, as a measure to reduce the risk to human and animal health, and the environment.

Although most registrants who previously manufactured the rodenticides at issue complied with the EPA's 2008 RMD, one manufacturer exercised its right to appeal the decision. The challenge is currently being reviewed by an EPA Administrative Law Judge ("ALJ").

The appeal has not only placed the compliant registrants at a competitive disadvantage, but most importantly allowed the continued sale of the rodenticides, placing children, pets, and non-target wildlife at risk.

I am very concerned that the continued sale of these rodenticides during the ALJ review process and a subsequent Environmental Appeals Board review will result in unnecessary harm that can be avoided. Please take the necessary action to expedite the appeals process and conclude this matter.

Sincerely,



Chairwoman Debbie Stabenow

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