UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

PETITIONER AMVAC CHEMICAL CORPORATION'S OPPOSITION TO RESPONDENT'S <u>MOTION FOR ADDITIONAL DISCOVERY</u>

I. INTRODUCTION

Respondent Office of Pesticide Programs' ("OPP's") Motion for Additional Discovery should be denied for three independent reasons. <u>First</u>, OPP failed to follow the Presiding Officer's orders requiring conferral prior to filing motions for additional discovery. OPP never indicated to AMVAC that it intended to seek *any* additional discovery, even as AMVAC conferred with OPP regarding the discovery that AMVAC is seeking. Two phone calls were held, and AMVAC shared drafts of its requests with OPP in advance. At no point during the conferral on AMVAC's requests did OPP suggest it might seek its own additional discovery. Denial of OPP's Motion is the only fitting remedy for OPP's disregard for the Presiding Officer's orders to confer prior to filing it.

<u>Second</u>, OPP is on record arguing that no additional discovery – by any party – was warranted. OPP asserted in a filing earlier this month that "the statutory basis and facts of this

case are such that the Presiding Officer cannot determine 'that such discovery shall not in any way unreasonably delay the proceeding[,]'" and that "no outstanding evidence exists with 'significant probative value' requiring delay of the hearing."[1] OPP's new position (that there is such discovery) is clearly inconsistent with its prior position. OPP's gamesmanship should estop it from seeking discovery now; at the least, OPP's claim that the information it seeks is probative should be considered in light of its prior position that no discovery is warranted.

Third, even if the substance of OPP's request is considered, its requests for production of documents do not meet the standard for additional discovery set out in 40 C.F.R. § 164.51.[2] They do not seek information with probative value, and they are untargeted and vague such that responding would involve unreasonable delay.

Below, AMVAC explains why OPP's failure to engage in any meet-and-confer process concerning its requests (Section II.A.) and its inconsistent position from a prior filing (Section II.B.) should bar it from being granted any additional discovery. Section II.C. then outlines why OPP's requests for documents do not satisfy the requirements of the regulation regarding probative value and lack of unreasonable delay.

II. ARGUMENT

A. OPP's Motion Should be Denied for Its Failure to Confer

As noted above, OPP made no attempt to confer with AMVAC concerning OPP's requests, or even to disclose its intent to seek discovery to AMVAC, in violation of the Hearing and Scheduling Order Following Remand, Dkt. 30 ("Scheduling Order") and Order on

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[1] Respondent's Motion to Amend Hearing and Scheduling Order, Dkt. 31 ("OPP Motion to Amend"), at 7 n.10.

[2] AMVAC has no substantive objections to OPP's Requests for Admission ("RFAs"), but asserts that AMVAC still should not be ordered to comply for the reasons set forth in Sections II.A. and II.B. Some of OPP's RFAs may be able to be adopted, in some form, as joint stipulations of fact in advance of the hearing.

Respondent's Motion to Amend Hearing and Scheduling Order, Dkt. 33 ("Order on Motion to Amend"). The Scheduling Order stated that "the parties may now engage in further mutually agreed upon discovery utilizing the standard methods of discovery described in the Federal Rules of Civil Procedure," and that "[i]f the parties cannot agree on a discovery matter, they must file a motion seeking further discovery." Scheduling Order at 2. The Order on Motion to Amend, at 2, reiterated that motions should be filed "if the parties cannot agree on a discovery matter[.]"

It is clear from this language that a party must at least attempt to confer and agree on desired discovery as a predicate to filing a motion asking the Presiding Officer to order it. Not doing so would predictably lead to inefficiency, unnecessary motions practice, and an undue burden on the Office of Administrative Law Judges' resources. The need for conferral is consistent with the Federal Rules referenced in the Scheduling Order. Motions to compel in Federal Court must be accompanied by a certification that the party seeking discovery has "conferred or attempted to confer with the [other party] in an effort to obtain [discovery] without court action." Fed. R. Civ. P. 37(a)(1). Similarly, the local rules of most federal courts require the parties to confer before filing *any* non-dispositive motion. *See, e.g.*, D.D.C. LCvR 7(m) (requiring counsel, before filing, to discuss a motion with opposing counsel and make "a good-faith effort to determine whether there is any opposition to the relief sought and, if there is, to narrow the areas of disagreement").

AMVAC accordingly summarized its conferral about its own requests with OPP and the results of that conferral in its motion. AMVAC Mot. for Additional Discovery at 3, 17-19. In short, the parties had two phone calls concerning AMVAC's potential discovery (October 20 and 24). AMVAC provided copies of its proposed requests on October 21 (with the limited exception of one interrogatory and two requests for production that were described to OPP on the

call on October 24 and OPP indicated it would also not comply with voluntarily). At no time during either phone conversation, or in any email, did counsel for OPP indicate that OPP was even *considering* seeking additional discovery from AMVAC. AMVAC did not find it unusual that OPP did not raise potential requests, given OPP's prior assertion that no discovery was needed.

The Presiding Officer should deny OPP's Motion for Additional Discovery based on OPP's failure to confer. Denying the Motion on this basis is well within the Presiding Officer's authority. *See, e.g.*, 40 C.F.R. § 164.40(d); *Deepgulf, Inc. v. Moszkowski*, No. 3:18-cv-1466-MCR/MJF, 2019 WL 10631283, at *2 (N.D. Fla. Feb. 5, 2019) (listing cases in which a Federal Court of Appeal upheld a District Court denial of a discovery motion based on failure to confer). This is not a question of degree – this was a total failure by OPP to even suggest it might desire discovery, let alone attempt to confer, and therefore was a failure to comply with the requirement in the Scheduling Order and Order on Motion to Amend. OPP makes no attempt in its Motion to explain why it did not raise its proposed requests with AMVAC. AMVAC and the Presiding Officer are now compelled to respond to, and rule on, respectively, a motion that could have potentially been limited or eliminated if conferral had occurred. There are no mitigating considerations here. Denying OPP's Motion is the appropriate sanction for this noncompliance with the Scheduling Order and Order on Motion to Amend.

B. OPP Should be Judicially Estopped from Obtaining Additional Discovery

As the Supreme Court has held, "[w]here a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him." *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001) (citation omitted). "This rule, known as judicial estoppel, generally prevents a

party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase." *Id*. According to the Supreme Court, the relevant factors are: (1) whether the new position is "clearly inconsistent" with the prior one; (2) whether the party altering its position obtained a benefit from advancing the initial position; and (3) whether unfair advantage could be gained, or unfair detriment imposed, if the position-altering party is not estopped. *Id.* at 750-51.[3]

Based on OPP's abrupt 180-degree pivot on its need for discovery, the standard for judicial estoppel is satisfied. Not a full month ago, OPP argued that the hearing date should be advanced, and discovery eliminated entirely, in large part because no evidence was outstanding that could possibly warrant discovery (for any party) under the criteria set forth in 40 C.F.R. § 164.51. OPP stated, *inter alia*, as follows:

1. "[T]here is no indication in the Remand that the scope of a hearing should be expanded to such a degree that additional discovery, subpoenas, or additional briefing would be necessary or warranted." OPP Mot. to Amend at 3.
2. "[T]he Remand contains numerous indications that the required hearing should be limited to evidence already in the record." *Id.*
3. "[T]he statutory basis and facts of this case are such that the Presiding Officer cannot determine 'that such discovery shall not in any way unreasonably delay the proceeding.'" *See* 40 C.F.R. § 164.51(a)(1). OPP Mot. to Amend at 7 n.10.
4. "[N]o outstanding evidence exists with 'significant probative value' requiring delay of the hearing." *Id.*

[3] Judicial estoppel has been applied against government agencies in similar situations. *See, e.g.*, *Reynolds v. Comm'r of Internal Revenue*, 861 F.2d 469, 474 (6th Cir. 1988) (refusing to allow IRS "knowingly to take a position in one judicial proceeding, secure final judicial acceptance of that position, and then knowingly attempt to persuade a different court to accept a fundamentally inconsistent position"); *Doe v. Dep't of Just.*, No. CH–0752–14–0332–I–1, 2015 WL 9275440 (M.S.P.B. Dec. 21, 2015) (applying judicial estoppel against government agency). OPP may continue to contest AMVAC's request for hearing – without prejudice to OPP, per its earlier statement – even if it is estopped from seeking discovery. OPP Mot. to Amend at 7 n.10.

AMVAC opposed OPP's Motion to Amend. The Presiding Officer partially granted OPP's Motion to Amend, cutting the time available for discovery by two weeks, shortening the time available to file discovery motions by three days, and advancing the hearing from February to January. Order on Mot. to Amend at 2. Now, contrary to its prior representations, OPP asserts that twenty-seven (27) Requests for Admission ("RFAs") and six (6) expansive Document Requests ("RFPs") "seek admission about facts and documents that have significant probative value to the question before the Presiding Officer[.]" OPP Mot. for Additional Discovery at 2.

The first *New Hampshire* factor – inconsistency – is readily satisfied. Wishing not to engage in additional discovery, OPP argued as set forth above that no additional discovery *could ever satisfy* the standard for granting it. It represented that "no outstanding evidence exists with 'significant probative value' requiring delay of the hearing." OPP Mot. to Amend at 7 n.10. The Presiding Officer aptly summarized OPP's position as "no further discovery is warranted to comply with the EAB's Order." Order on Mot. to Amend at 1. OPP now argues, in direct conflict with its prior assertions, that additional discovery is appropriate and that its requests seek evidence that has "significant probative value to the question before the Presiding Officer." OPP Mot. for Additional Discovery at 2. OPP's positions are "fundamentally inconsistent" and thus satisfy the first criterion for judicial estoppel. *Reynolds*, 861 F.2d at 474.

The second factor – whether OPP obtained a benefit from arguing that no discovery could ever be appropriate – is also satisfied. OPP sought, and obtained, a shortened schedule on the premise that no discovery was needed. The Presiding Officer removed two weeks from the time frame formerly established for discovery (Dec. 2 instead of Dec. 16) and three days from the time frame for conferring and filing motions for discovery (Oct. 25 instead of Oct. 28). Order on Mot. to Amend at 2. It stands to reason that the Presiding Officer would have been far less likely

to shorten the time frame she originally set aside for discovery if OPP had presented its current position in its Motion to Amend instead of being strenuously and categorically opposed to additional discovery as it was. OPP has thus already benefitted from its prior position in that the window for discovery has been significantly shortened. OPP stands to benefit further from its prior position to the extent it is now able to successfully argue that it cannot/should not be obligated to comply with AMVAC's discovery requests in the now-shortened time frame that OPP obtained through its Motion to Amend.

The third *New Hampshire* factor – whether OPP will benefit further, or AMVAC will suffer unfair detriment, if OPP is not estopped – is also satisfied. According to OPP's prior statements, OPP can continue its defense of the Notice of Intent to Suspend ("NOITS") – without prejudice to OPP – even without the discovery it seeks. OPP Mot. to Amend at 7 n.10. If OPP is granted the opportunity to take discovery, OPP will benefit (and AMVAC will be prejudiced) to the extent OPP obtains both an accelerated schedule and discovery from AMVAC, forcing AMVAC to spend its limited time and resources searching for and producing documents that OPP has stated it has no use for. OPP's Motion for Additional Discovery does not acknowledge or attempt to justify OPP's duplicity on the issue of whether additional discovery is called for. Application of judicial estoppel is appropriate under these circumstances.

C. OPP's Document Requests Do Not Satisfy the Requirements in the Regulation

Even if OPP's document requests are considered on their merits, despite the defects identified above, they do not satisfy the standard for additional discovery. 40 C.F.R. § 164.51(a) provides that additional discovery may be permitted if the Presiding Officer determines:

> (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.

OPP's requests for documents do not meet criteria (1) or (3) above. With regard to unreasonable delay, they are untargeted, extremely broad, and vague. They also do not seek information that has significant probative value in this matter. AMVAC first discusses the failure to seek information relevant to the determination of whether AMVAC took "appropriate steps," (criteria 3) and then discusses why the requests are unreasonable in their breadth (criteria 1).

1. *OPP's Document Requests Do Not Seek Probative Information*

The phrase "probative value" in the regulations refers to the "tendency of a piece of information sought to prove a fact that is of consequence in the case." *In re Chautauqua Hardware Corp.*, EPCRA Appeal No. 91-1, 3 E.A.D. 616, 622, Order on Interlocutory Review (EAB, June 24, 1991). OPP's entire explanation of the potential probative value of the documents it seeks is as follows:

> Respondent's requests for documents *are limited to addressing 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. Such documents would be expected to demonstrate that AMVAC's actions did not constitute reasonable steps to secure other data required by the DCPA DCI.

OPP Mot. for Additional Discovery at 2 (emphasis added). A review of OPP's proposed document requests ("OPP RFPs") tends to confirm that OPP seeks documents concerning AMVAC's decision-making process. For example, OPP RFPs 1, 2, and 5 ask for documents "referring to or discussing . . . decision[s]" made by AMVAC to take, or not take, specified actions. Respondent's Requests for Admission and Document Requests to AMVAC at 7-8. Similarly, OPP RFP 6 seeks documents "detailing what additional information AMVAC *intended* to provide," about various data requirements following certain other events. *Id.* at 8 (emphasis added). OPP knows what "additional information" AMVAC actually provided, and so OPP must intend to discover if AMVAC considered providing something but did not. OPP

RFPs 3 and 4 could be construed to reach information beyond AMVAC's decision-making process, though OPP's motion says that all 6 of its requests are "limited to addressing AMVAC's decision to take steps . . . ." OPP Mot. for Additional Discovery at 2. OPP's short motion contains only a conclusory assertion that documents responsive to its RFPs "would be expected to demonstrate that AMVAC's actions did not constitute reasonable steps." *Id.*[4] OPP's motion does not explain how inquiry into AMVAC's internal decision-making processes is relevant.

Information concerning AMVAC's internal decision-making processes does not have "significant probative value" in this proceeding because such information does not "tend[] . . . to prove a fact that is of consequence in the case." *Chautauqua*, 3 E.A.D. at 622. The statutory standard requires a registrant to take "appropriate steps" in response to a data-call in. 7 U.S.C. § 136a(c)(2)(B)(iv).[5] The EAB observed that the contemporary meaning of the word "step" was "an action, proceeding, or measure often occurring as one in a series." "Appropriate" modifies "step" and means "specially suitable: fit, proper." *In re AMVAC Chemical Corporation*, 18 E.A.D. 769, 790 (EAB 2022). Actions, proceedings, and measures are all observable, objective phenomena. Nowhere does the EAB suggest a subjective component of the "appropriate steps" inquiry whereby an otherwise appropriate course of action could be rendered inappropriate based on a registrant's subjective intent and/or its internal decision-making processes leading to that course of action, or vice versa.

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[4] OPP's entire justification for its requests having "significant probative value" consists of three conclusory assertions that the information sought will demonstrate that AMVAC did not take appropriate steps without elaboration. OPP Mot. for Additional Discovery at 2 (paragraph beginning, "Finally, . . . ").

[5] FIFRA does specify certain instances in which subjective intent is relevant to whether a violation occurred. *E.g.*, 7 U.S.C. § 136j(a)(2)(M) (referring to "knowingly falsify[ing]" documents submitted to EPA). 7 U.S.C. § 136a(c)(2)(B)(iv) contains no such language.

Finding that subjective intent (*i.e.*, why a registrant chose to take an action or not) is potentially relevant would add another vast dimension to this proceeding. Consider the ramification of such a finding in the context of the EAB's determination that it is material whether AMVAC's conduct was "typical of how registrants address data call-ins." *Id.* The parties would need information not only about what other registrants did or did not do (the subject of several of AMVAC's discovery requests) but about the analysis and decision-making processes and strategies that led those registrants to respond the way that they did. Any such discovery would involve third-party subpoenas and would be exceedingly time-consuming (notwithstanding that any such subpoenas would likely be strenuously resisted).

Moreover, OPP should not require any such information to present its case. The NOITS refers only to AMVAC's alleged actions and inactions, and OPP had stated that it had no need for additional discovery on any issue as recently as October 7, as discussed above. OPP's document requests should be denied because they seek information with no probative value.

2. *OPP's Document Requests Are Unreasonably Vague and Overbroad*

OPP's requests are vague and do not contain reasonable limiting criteria. This might have been rectified, or at least mitigated, if OPP had conferred as ordered, but that did not happen as discussed above. OPP's requests as presented in its Motion for Additional Discovery will introduce undue delay and burden. It is unclear what it means for a document to "refer[] to or discuss[]" a decision. OPP RFPs 1, 2, 5. Short of the obvious case in which employees discuss which of two courses of action to take, it will be difficult to discern whether many documents refer to or discuss a decision within OPP's meaning. And finding such documents would still require a full review of all emails in AMVAC's "possession or control" relating to that data requirement, since "referring to or discussing [a] decision" does not lend itself to any sort of mechanical search criteria. Nor has OPP specified individuals to limit the search to.

How one identifies "communications detailing what additional information AMVAC intended to provide to EPA," OPP RFP 6, is even less clear. Does OPP seek only communications that specify what information is "additional" as compared to a prior submission? Does OPP seek only communications discussing information AMVAC considered providing but ultimately chose not to? OPP would of course already have all communications in which AMVAC provided information to EPA. OPP has again not specified individuals to limit the search to, nor suggested specific date ranges, and it has left AMVAC to interpret its references to "previously denied" and "previously determined" for each data request.

OPP RFP 4 (documents and communications between AMVAC and any contract laboratory or consultant referring to or discussing the timing for initiation of any still-outstanding data requirement) is overbroad. This request should have been limited to only those data requirements (and related studies) for which OPP asserts timing of initiation is at issue. In many instances, the precise timing of when AMVAC contacted a laboratory about initiating a study would not appear to have any relevance (*e.g.*, the Series 860 Residue Chemistry studies, which AMVAC is principally attempting to address through label amendments). For many other data requirements, the relevant inquiry focuses on data waiver requests and whether specific waiver requests constituted appropriate steps, not the timing of study initiation. AMVAC should not have to attempt to infer EPA's meaning from its overbroad requests; OPP's obligation was (apart from conferring) to narrowly tailor its requests and explain the potential relevance of its requests to the Presiding Officer in a more-than-conclusory fashion.

OPP RFP 3 ("documents … used to track the data requirements identified in the DCPA DCI and AMVACs response(s) and/or progress in responding to those data requirements") is similarly unbounded. Respondent's Requests for Admission and Document Requests to

AMVAC at 7. Does OPP seek copies of any such document as it exists today? Is it asking AMVAC to search for copies of such a document as it may have existed at certain points in time? Arguably any email referring to the status of any data requirement from the NOITS at any point in time would be a document "used to track the data requirements identified in the DCPA DCI and AMVACs response(s) and/or progress in responding to those data requirements."

All of these issues and more could and should have been addressed during the required consultation between the parties. Having failed to confer, OPP bears the burden to demonstrate its need for such vague and overbroad requests, and it has not done so.

III. CONCLUSION

For each of the reasons set forth above, OPP's Motion for Additional Discovery should be denied. It should be denied in its entirety for the reasons set forth in Sections II.A. and II.B. and, to the extent it seeks production of documents, for the reasons set forth in Section II.C.

Date: October 31, 2022

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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

/s/ *Hume M. Ross*
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Dated October 31, 2022