



**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:)
)
Bayer CropScience LP and) **FIFRA-HQ-2016-0001**
Nichino America, Inc.,)
)
Petitioners.)

ORDER SCHEDULING HEARING AND PREHEARING PROCEDURES

As you have been previously notified, the undersigned has been designated to preside over this proceeding. This proceeding is governed by the Rules of Practice Governing Hearings, under the Federal Insecticide, Fungicide, and Rodenticide Act, Arising from Refusals to Register, Cancellations of Registrations, Changes of Classifications, Suspensions of Registrations and Other Hearings Called Pursuant to Section 6 of the Act, 40 C.F.R. Part 164 (“Rules of Practice”), to the extent applicable. The parties are advised to familiarize themselves with the applicable statute(s) and the Rules of Practice. Consistent with the Section 6(e) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136d(e), that “a hearing shall be held and a determination made within seventy-five days after receipt of a request for such a hearing” and the Rules of Practice which provide in pertinent part that “the Administrative Law Judge shall have power to take actions and decisions in conformity with statute or in the interests of justice,” 40 C.F.R. § 164.40(d), the procedures provided in the Rules of Practice will be modified as outlined in the paragraphs below.¹

Settlement. Agency policy strongly supports settlement and each party is reminded that pursuing this matter through a hearing and possible appeals will require the expenditure of significant amounts of time and financial resources. The parties should realistically consider the risk of not prevailing in the proceeding despite such expenditures. A settlement allows the parties to control the outcome of the case, whereas a judicial decision takes such control away. The Office of Administrative Law Judges offers the assistance of a neutral to facilitate settlement negotiations if all parties agree in writing.

However, be advised that the mere pendency of settlement negotiations or even the existence of a settlement in principle does not constitute a basis for failing to strictly comply with the following prehearing exchange requirements or otherwise delaying the proceedings. Only the filing with the Headquarters Hearing Clerk of a fully-executed Consent Agreement and Final

¹ Any inconsistencies between the Rules of Practice and the procedures described in this Order will be resolved in favor of expeditiously concluding this hearing and determination within the seventy-five days established by Section 6(e)(2) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136d(e)(2).

Order, or an order of the judge, excuses noncompliance with filing deadlines.

Opportunity for a Hearing. The Notice of Intent to Cancel (“NOIC”) in this matter gave Petitioners notice and opportunity for a hearing, in accordance with Section 554 of the Administrative Procedure Act, 5 U.S.C. §§ 554 *et seq* (“APA”). In this regard, Section 554(c)(2) of the APA provides that a hearing be conducted under Section 556 of the APA. Section 556(d) provides that a party is entitled to present its case by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. Generally, the parties are entitled to elect any or all three means to present its case. If any party intends to elect only to conduct cross-examination of witnesses and to forgo the presentation of direct and/or rebuttal evidence, the party shall serve a statement to that effect on or before the date for filing its prehearing exchange. If all parties are agreeable to having the case decided on the written record, they shall submit a joint statement to that effect.

Given the statutory time period, the time allotted to a hearing in this matter is limited. Therefore, direct testimony of witnesses will only be allowed by verified written statements provided in advance of the hearing. The proponent of a witnesses’ verified written statement must ensure that the witness is available for cross-examination in person at the hearing unless the opposing party waives such requirement in writing.

Intervention and Amicus Curiae. Leave to intervene will be freely granted, per 40 C.F.R. 164.31(c). Motions for leave to intervene must be filed no later than April 15, 2016, and be accompanied with any primary discovery materials as outlined below.

Persons who do not request to intervene but would like to file briefs may do so by filing a motion for leave to file an *amicus curiae* brief together with the brief by April 15, 2016.

Hearing. The hearing in this matter will be held beginning promptly at 8:30 a.m. on **Tuesday, May 10, 2016**, and continue as necessary through **Friday, May 13, 2016**, at the following location:

EPA Administrative Courtroom
EPA East Building, Room 1152
1201 Constitution Avenue, NW
Washington, D.C. 20460

Scope of the Hearing. The scope of a hearing challenging the proposed cancellation of a conditionally registered pesticide under Section 6(e) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136d(e), is limited to two narrow issues – (1) “whether the registrant has initiated and pursued appropriate action to comply with the condition or conditions within the time provided or whether the condition or conditions have been satisfied within the time provided, and [2] whether the Administrator’s determination with respect to the disposition of existing stocks is consistent with [FIFRA].” The validity or invalidity of any condition of registration is not an issue in this proceeding.²

² If any party has a good faith basis for disagreeing with this preliminary legal conclusion, it may set out the basis therefor as part of its discovery filing regarding the scope of the hearing.

The Notice of Intent to Cancel Pesticide Registrations states that, as a “condition of registration,” the registrants were obligated to “expeditiously request voluntary cancellation of the registrations if EPA determined the registrations did not meet the FIFRA standard for registration.” The EPA notified the registrants of such a determination by letter dated January 29, 2016, and the registrants refused to request the voluntary cancellation by letter dated February 5, 2016. Thus, it appears that the issue of whether or not the conditions of registration have been satisfied is not an issue in this proceeding.³ Therefore, the only issue to be decided in this proceeding is whether the Administrator’s determination with respect to the disposition of existing stocks is consistent with FIFRA.

Primary Discovery. Accordingly, it is directed that the following prehearing exchange of primary discovery materials take place between and among the parties:

1. Each party⁴ shall file with the Headquarters Hearing Clerk, serve on all other parties, and serve on the Presiding Judge:
 - (A) a list of names of all expert and other witnesses it intends to call at hearing, identifying each either as a fact witness or an expert witness and submit a curriculum vitae or resume for each identified expert witness or, in lieu of the foregoing, submit a statement that no witnesses will be called;
 - (B) for each witness (fact and expert) identified, submit a verified written statement to serve as that witnesses’ direct testimony;
 - (C) a list and copies of all documents and exhibits intended to be introduced into evidence, identified as “Respondent’s Exhibit,” “Petitioner (Name)’s Exhibit,” “Intervenor (Name)’s Exhibit, as appropriate, and numbered sequentially with Arabic numerals (*e.g.*, “PBX 1” for “Petitioner Bayer’s Exhibit 1”);
 - (D) a statement identifying any objections to the scope of the hearing and the factual and legal bases in support of the objections;

³ If any party has a good faith basis for disagreeing with this preliminary legal conclusion or the facts upon which it is based, it may set out the basis therefor as part of its discovery filing in regard to the scope of the hearing.

⁴ The Rules of Practice define the “Respondent” as the Assistant Administrator of the Office of Prevention, Pesticides, and Toxic Substances. 40 C.F.R. § 164.2(s). Subsequent to the promulgation of the Rules of Practice, the Office of Prevention, Pesticides, and Toxic Substances was reorganized and renamed the Office of Chemical Safety and Pollution Prevention. Thus, the parties to this action are the Assistant Administrator of the Office of Chemical Safety and Pollution Prevention of the U.S. Environmental Protection Agency (“Respondent”), and Bayer CropScience LP and Nichino America, Inc. (“Petitioners”). 40 C.F.R. §§ 164.2(o), 164.2(s), 164.31(c).

(E) a list of any matters of which the party requests official notice be taken;

(F) a statement of whether translation services are necessary in regard to the testimony of any witness(es), and, if so, state the language to be translated.

2. The prehearing exchanges called for above shall be filed by April 22, 2016.

Section 164.50(b) of the Rules of Practice provides that documents, exhibits and witness testimony not included in the prehearing exchanges may not be added or amended except upon **motion** granted. Therefore, each party should very thoughtfully prepare its prehearing exchange.

Due to the narrow scope of the hearing and the statutory time limit within which an Agency determination must be made (including ruling upon any appeal to the Environmental Appeals Board), motions requesting additional discovery or extensions of time will not be granted absent extraordinary circumstances.

Filing and Service. The original and two copies of any documents filed in this proceeding, including prehearing exchange information and motions, shall be filed with the Headquarters Hearing Clerk, per 40 C.F.R. § 164.5(a). Documents may be filed electronically⁵ by visiting the website for the Office of Administrative Law Judges - https://yosemite.epa.gov/OA/EAB/EAB-ALJ_Upload.nsf. Parties may also file by U.S. mail, personal delivery, courier, or commercial delivery service. Regardless of submission method, all documents submitted for filing must be signed, accompanied by a certificate of service, and served on the undersigned judge and on each party.

Documents filed electronically should be submitted online using the OALJ E-Filing System.⁶ Parties must first register to use the OALJ E-Filing System. Registration is not automated. **There may be a delay of 1–2 business days between the time a party applies for registration and the time that party will be able to upload documents into the system.** Documents filed electronically must be in Portable Document Format (“PDF”), must be signed, and must contain the contact name, phone number, mailing address, and e-mail address of the filing party or its authorized representative. Documents filed electronically are deemed to constitute both the original and any copies required by the Rules of Practice. **NOTE:** The OALJ E-Filing System is not designed to protect the privacy of any Confidential Business Information (“CBI”) or Personally Identifiable Information (“PII”), and whenever a document is filed electronically, the undersigned will consider all confidentiality claims waived.

Documents filed by personal delivery, courier, or a commercial delivery service such as FedEx or UPS should be addressed to:

⁵ Electronic filing is the very strongly preferred method of submitting documents to the Office of Administrative Law Judges in this case due to the statutory time limit. Due to security screening OALJ’s receipt of documents sent by mail can be significantly delayed.

⁶ Registered users of the E-Filing System may find more information about electronic filing on the E-Filing instructions page available at the OALJ E-Filing System Main Menu.

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
Ronald Reagan Building, Room M1200
1300 Pennsylvania Ave., NW
Washington, DC 20004

Documents filed by mail via the United States Postal Service (“USPS”) should be addressed to:

Sybil Anderson, Headquarters Hearing Clerk
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Ave., NW
Mail Code 1900R
Washington, DC 20460

A document submitted by U.S. mail, personal delivery, courier, or commercial delivery service is considered timely if it is postmarked on the due date except as to initial filings requesting a hearing. A document submitted to the OALJ E-Filing System is considered “filed” at the time and date of electronic reception as recorded by the OALJ E-Filing System. To be considered timely, documents submitted by e-mail to the OALJ E-Filing System must be received by 11:59 p.m. Eastern Time on the date the document is due, unless another time is specified by the Presiding Judge. The OALJ E-Filing system will generate an electronic receipt of the submission that will be sent by email to both the party submitting the document and the Headquarters Hearing Clerk. There may be a delay between document submission and transmission of the electronic receipt.⁷ **The use of the OALJ E-Filing System constitutes consent to the service of orders by electronic mail to the email address used to register for the OALJ E-Filing System.**

Documents may be served by first-class (including certified) or priority mail, personal delivery, reliable commercial delivery service, or e-mail if the party being served has provided a valid e-mail address in the record. Documents filed via the OALJ E-Filing System are also deemed to have been “served” on the undersigned. Documents may not be served on any party using the OALJ E-Filing System. For service on parties, a document is considered “served” upon mailing, when placed in the custody of a reliable commercial delivery service, or upon electronic transmission.

If a document is filed other than through the OALJ E-Filing System, the parties are requested to send a courtesy copy upon issuance to the Office of Administrative Law Judges by emailing an electronic copy to the Presiding Judge’s staff attorneys, Michael B. Wright and Ryan Yaeger, at wright.michaelb@epa.gov and yaeger.ryan@epa.gov, respectively, followed by service of a hard copy of the document. All documents submitted for filing must be signed, accompanied by a certificate of service, and served on each party.

⁷ The Hearing Clerk may not be able to confirm receipt of the document earlier than one hour after the transmission of the electronic receipt.

The parties are advised NOT to include, attach, or refer to any terms of settlement offers or agreements in any document submitted to the Presiding Judge, and no copies of Consent Agreements and Final Orders shall be submitted, or attached to any document submitted, to the Presiding Judge except those that are fully executed and filed with the Headquarters Hearing Clerk.

Privacy Act Statement; Notice of Disclosure of Confidential and Personal Information; Waiver of Confidentiality and Consent to Public Disclosure. The parties are cautioned that, all information filed with the court will be made publicly available, unless properly protected via redaction, seal and/or protective order, in accordance with applicable legal provisions in the Act, the Rules of Practice, and 40 C.F.R. Part 2.

When it is necessary to file Confidential Business Information (“CBI”) or Personally Identifiable Information (“PII”) pertaining to any person, the parties are hereby advised to redact (i.e., remove or obscure) the CBI or PII present in the materials filed. This may include information that, if disclosed to the public, would constitute an unwarranted invasion of personal privacy, such as Social Security numbers, medical records and personal financial information. The filing party shall file a non-confidential version of the document, wherein the filing party redacts the information claimed to be entitled to confidential treatment and replaces it with notes indicating the nature of the redacted information. The redacted document will be included in the public record. The filing party shall also file under seal an unredacted version of the document, clearly and prominently marked as confidential, which will be retained as part of the case file but not disclosed to the public. Both the redacted and unredacted documents shall be served on the undersigned and any party and non-party participant authorized to receive the given information.

To the extent that any person files or submits any un-redacted CBI or PII pertaining to themselves or their client, that person thereby waives any claims to confidentiality and thereby consents to public disclosure by OALJ, including posting on the Internet, of all such information they submit.

Contact Information. Contact may be made with the Headquarters Hearing Clerk, Sybil Anderson, at (202) 564-6261 or anderson.sybil@epa.gov to ask whether a document has been received or issued. For procedural questions, you may contact the Presiding Judge’s staff attorneys, Michael B. Wright and Ryan Yaeger, at wright.michaelb@epa.gov and yaeger.ryan@epa.gov, respectively. **Under no circumstances should you telephone or e-mail the Presiding Judge directly.**

Expedited Courtesy Copies of Decisions and Orders. If any party wishes to receive, by e-mail or facsimile, an expedited courtesy copy of decisions and substantive orders issued in this proceeding, the party shall submit a request for such copies by letter addressed to the Presiding Judge’s paralegal, Danielle Pope, at pope.danielle@epa.gov. The letter shall include the case docket number, the party’s e-mail address or facsimile number, and a statement as to whether the party requests expedited courtesy copies of (a) the initial decision and/or any orders on motion for accelerated decision or dismissal, or (b) all decisions and substantive orders. The undersigned’s office will endeavor to comply with such requests, but does not guarantee the

party's receipt of expedited courtesy copies.

Motions. Prior to filing any motion, the moving party must contact the other party or parties to determine whether the other party has any objection to the granting of the relief sought in the motion, and the motion shall state the position of the other party or parties. The mere consent of the other parties to the relief sought does not assure that the motion will be granted.

Furthermore, all motions must be submitted in sufficient time to permit the filing of a response by the other party and/or the issuance of a ruling on the motion before any relevant deadline set by this or any subsequent order. The 10-day response period for motions, with an additional 3 days added thereto if the document is served by mail provided for in Sections 164.60 and 164.6 of the Rules of Practice is impractical given the limited amount of time available to issue a determination. Therefore, parties will be provided only seven days to respond in writing to any dispositive motions, and only three calendar days to respond to motions that are not dispositive. **Dispositive motions must be filed no later than April 11, 2016.** The movant may file a reply brief to dispositive motions, if necessary, no later than three *business* days after the filing of the response to its motion. Parties shall make every effort to serve motions by the most expeditious means possible to ensure its receipt within twenty-four hours. Motions not filed and served in a timely manner may not be considered. There will be no oral argument on motions filed prior to the hearing.

Post-hearing Briefs. After the conclusion of the hearing any party may file a brief summarizing its position and the admitted evidence in support of its position. The post-hearing briefs shall be limited to fifteen one-sided pages in length, with 12 pt font and one inch margins. The post-hearing brief shall be filed no later than May 18, 2016.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: April 4, 2016
Washington, D.C.

In the Matter of Bayer CropScience LP and Nichino America, Inc., Petitioners.
Docket No. FIFRA-HQ-2016-0001

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Order Scheduling Hearing and Prehearing Procedures**, was issued by Chief Administrative Law Judge Susan L. Biro dated April 4, 2016, was served this day in the following manner to the addressees listed below:



Michael B. Wright
Staff Attorney

Original and one copy to:
Sybil Anderson
Headquarters Hearing Clerk
U.S. EPA
Mail Code 1900R
1200 Pennsylvania Avenue, NW
Washington, DC 20460-2001

Copy by *e-mail only* to:

Counsel for Respondent
Ariadne Goerke
Robert Perlis
Scott Garrison
Pesticides and Toxic Substances Law Office
Office of General Counsel (Mail Code 2333A)
U.S. Environmental Protection Agency
WJC North 731B
1200 Pennsylvania Avenue, N.W.
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Dated: April 4, 2016
Washington, DC