

**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,)**

Petitioners.)

Docket No. FIFRA-HQ-2022-0002

**PETITIONER AMVAC CHEMICAL CORPORATION'S
MOTION FOR PRODUCTION OF DELEGATION DOCUMENTS**

AMVAC Chemical Corporation (“AMVAC”) hereby moves the Presiding Officer, pursuant to 40 C.F.R. § 164.60, to enter an order requiring the Office of Pesticide Programs (“OPP”) to provide copies of documents evidencing the delegation of certain authorities from the Administrator of the Environmental Protection Agency (“EPA”) to individuals within OPP, as set forth in more detail below.

Good cause exists to require the production of these documents because, at a minimum, the authority of various EPA personnel to take actions during the course of the Data Call-In will be relevant to whether AMVAC failed to take appropriate steps in response. Based on the narrowed scope of the hearing following OPP’s most recent Status Report, waiver requests, and responses thereto, will be central to the issues discussed at the hearing. As discussed in more detail below, it is accordingly relevant, not only to this case but to the continued availability of DCPA to American farmers, whether certain of OPP’s factual assertions in the NOITS – that waiver requests were in fact denied, *see* JX 1 – were valid. Because of the relevance of these documents, because they will likely not otherwise be timely available, and because requiring their production will not burden OPP or otherwise delay this proceeding, the Presiding Officer should order their production.

Background

In OPP’s response to AMVAC’s Request for Admission (“RFA”) 19, OPP stated that “EFED [OPP’s Environmental Fate and Effects Division] and HED [OPP’s Health Effects Division] only make recommendations that a waiver request be granted; the decision to waive or not waive data rests with PRD [OPP’s Pesticide Re-Evaluation Division].” EFED’s statements in documents relevant to this matter use terminology consistent with this assertion – *e.g.*, “EFED recommends that PRD deny” Joint Exhibit (“JX”) 66 at 5, 6. OPP’s filings have referred

generically to “EPA” or “the Agency” as denying waiver requests, rather than asserting that PRD did so. *E.g.*, Motion for Accelerated Decision at 13, 14; NOITS, JX 1, at 9-10. The response to RFA 19 was the first instance in this matter in which OPP referenced the existence of a requirement that PRD, rather than EFED, formally act on waiver requests.

AMVAC has searched publicly available sources for relevant delegation documents. That search revealed that EPA does not maintain publicly available copies of the delegation documents requested here. AMVAC was able to locate a copy of EPA’s “Delegations Manual” that had been provided in response to a Freedom of Information Act (“FOIA”) request filed by others in 2017. *See* foiaonline.gov, Request ID EPA-HQ-2017-002298 (referred to herein as the “2017 FOIA Delegations Manual”). The 2017 FOIA Delegations Manual includes several delegations relevant to this matter as described below. Critically, however, the 2017 FOIA Delegations Manual, in addition to being several years old, only includes delegations to the Assistant Administrator (“AA”) level. The delegations in the manual provide for further re-delegation to specified officials below the AA, but the manual does not include any copies of such further redelegations, if they exist.

Counsel for AMVAC asked OPP counsel on Monday, January 2, to voluntarily produce the delegation documents discussed herein, but OPP counsel informed counsel for AMVAC the following evening that OPP would not be able to respond that day, and that “OPP’s decision whether to provide the documents and/or provide a responsive motion would not be affected” if AMVAC were to proceed to file this motion. No further response was provided prior to the filing of this motion.

OPP Should Be Required to Produce the Delegation Documents

Several delegations in the 2017 FOIA Delegations Manual AMVAC has obtained are relevant to this matter. A delegation identified as “5-38” in the 2017 FOIA Delegations Manual, provided herewith as Exhibit 1, states that the authority to perform “functions and responsibilities relative to the periodic review of pesticide registrations pursuant to Section 3(g) of FIFRA, as amended, and the regulations set forth in 40 CFR Part 155, Subpart C” was delegated to the AA for Chemical Safety and Pollution Prevention, and could be further delegated to the Director of OPP. Delegation 5-38 also allows “ ... the authority to *grant or deny requests for time extensions or data waivers relating to Data Call-in Notices* issued in conjunction with registration review [to] be redelegated further to the branch chief level or equivalent[.]” But critically, the 2017 FOIA Delegations Manual does not include any redelegation documents actually delegating this authority to the branch chief level or otherwise to anyone other than the AA indicated.

A second delegation in the 2017 FOIA Delegations Manual, identified as “5-7,” pertains to authority to perform functions related to the suspension of pesticides. It delegates this authority to the AA level (of both the Office of Chemical Safety and Pollution Prevention and the Office for Enforcement and Compliance Assurance) and it permits redelegation to the Division Director level, and it retains certain authority to the Administrator. No evidence of redelegations beyond the AA level are included in the 2017 FOIA Delegations Manual. A copy of delegation 5-7 from the 2017 FOIA Delegations Manual is also included in Exhibit 1.

The specifics of any redelegations under either delegation discussed above are relevant to this matter.¹ Delegation 5-7 implicates the authority to issue the Notice of Intent to Suspend (“NOITS”) itself. Delegation 5-38 is relevant to whether certain factual assertions in the NOITS are true. OPP asserts repeatedly in the NOITS that documents that, on their face, only constitute EFED’s recommendations to PRD concerning waiver requests were nonetheless denials of waiver requests. *See, e.g.*, JX 1 at 9 (asserting that in JX 66, a memo from EFED to PRD, “[t]he Agency denied” a data waiver request). Absent further delegations of authority beyond those in the 2017 FOIA Delegations Manual, no signatory of JX 66 possessed authority to deny AMVAC’s waiver request.

Having all relevant active delegations and re-delegations in the record will streamline the hearing and briefing. AMVAC could ask one or more EPA witnesses about the content of these documents at the hearing, but these witnesses will not have any obligation to have reviewed or to otherwise be familiar with (or be in possession of) these documents as they are expected to appear in their individual capacities.

The burden on OPP to produce these documents is minimal and so no delay will result. They are final agency documents, identified with specificity in this motion, and EPA has previously produced similar documents (*e.g.*, the 2017 FOIA Delegations Manual) in response to FOIA requests without asserting any claim of privilege.²

¹ Similar language to delegation 5-38 concerning waiver requests appears in a delegation identified as “5-1-C,” though this delegation appears to pertain to the “reregistration” program rather than Data Call-Ins in connection with registration review. This delegation document is also included in Exhibit 1.

² AMVAC is simultaneously filing a FOIA request for these documents, but based on typical FOIA processing timelines, does not expect to obtain the documents before the conclusion of pre-hearing briefing or the hearing itself.

WHEREFORE, because any existing redelegation documents are likely to be relevant, will streamline the briefing and hearing if timely provided, and producing them will be minimally burdensome, AMVAC requests an order requiring OPP to provide the following documents as soon as reasonably practical, but in no event later than Noon Eastern on January 9, 2023:

1. All documents memorializing a delegation of authority to grant or deny waiver requests in connection with the DCPA DCI that grant such authority to any person within EPA below the Administrator that are now in force, or that were in force at any time after the issuance of the DCI.

2. All documents memorializing a delegation of authority to issue a NOITS in connection with the DCPA DCI that grant such authority to any person within EPA below the Administrator that were in force in April of 2022.

Date: January 4, 2023

Respectfully Submitted,

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Counsel for AMVAC Chemical Corp.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Petitioner AMVAC Chemical Corporation's Motion for Production of Delegation Documents**, was sent on January 4, 2023, to the following parties in the manner indicated below.

/s/ Hume M. Ross
Hume M. Ross

Copy by OALJ E-Filing System to:

Mary Angeles
Headquarters Hearing Clerk
U.S. Environmental Protection Agency
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Ronald Reagan Building, Rm. M1200
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Copies by Electronic Mail to:

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Dated January 4, 2023