UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

ORDER ON MOTION FOR AN EXPEDITED DETERMINATION THAT EPA'S EXISTING STOCKS DECISION IS WITHIN THE SCOPE OF THE HEARING

I. PROCEDURAL HISTORY

On February 5, 2013, the Acting Assistant Administrator of the Office of Chemical Safety and Pollution Prevention of the U.S. Environmental Protection Agency ("Respondent," "EPA," or "the Agency") published a Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products ("NOIC"). 78 Fed. Reg. 8,123 (Feb. 5, 2013). The NOIC announces EPA's intention to cancel the registrations of twelve rodenticide products, pursuant to Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") Section 6(b), 7 U.S.C. § 136d(b), and to deny the applications for registration of two rodenticide products pursuant to FIFRA Section 3(c)(6), 7 U.S.C. § 136a(c)(6). 78 Fed. Reg. at 8,123–24. The NOIC lists "Reckitt Benckiser, Inc." as the Registrant for the products EPA intends to cancel, and "Reckitt Benckiser Inc." as the Registrant for the applications for registration EPA intends to deny. *Id.* at 8,123–24.

The NOIC states that affected registrants and other adversely affected parties may request a hearing on the NOIC by filing a request on or before March 7, 2013, and describes where to file such request and what procedural rules would apply to such a hearing. *Id.* at 8,127. The Agency also sets forth the legal authority and a summary of the reasons for its actions, and addresses the status of products that may have already been released for shipment in the event their registrations are ultimately cancelled. Specifically, the NOIC states, "EPA has determined that the continued sale and distribution of existing stocks of pesticide products cancelled pursuant to this Notice should not be permitted, except that EPA intends to allow the limited shipment of existing stocks for the sole purposes of lawful export, proper disposal, or return to the person from whom the holder of the existing stock purchased the product." *Id.* at 8,126–27. As to the scope of the hearing, if one is requested, the Agency writes in the NOIC that "EPA has determined not to include existing stocks as an issue in this hearing." *Id.* at 8,126. Rather, the NOIC states, "the only issues for hearing under this Notice are whether the subject products should be cancelled, or the applications should be denied." *Id*.

On March 6, 2013, Reckitt Benckiser LLC ("Reckitt") filed a Request for Hearing and Statement of Objections ("Objections") with twenty-one exhibits attached, in which it contests the actions proposed by the Agency in the NOIC. On March 7, 2013, the Louisville Apartment Association, the Greater Cincinnati Northern Kentucky Apartment Association, and Do it Best Corp. also each filed letters in which they requested a hearing and briefly set forth their objections.

On March 13, 2013, the undersigned was designated to preside over the matter.

On March 14, 2013, the Agency filed a copy of its NOIC and an accompanying Statement of Reasons and Factual Basis dated January 29, 2013, and signed by Steven P. Bradbury, Ph.D., Director, EPA Office of Pesticide Programs, which sets forth its reasons for taking the actions announced in the NOIC.

On April 12, 2013, Reckitt filed a Motion for an Expedited Determination that EPA's Existing Stocks Decision is Within the Scope of the Hearing ("Motion" and "Mot."), arguing that "EPA may not lawfully preclude Reckitt from obtaining a hearing concerning objections to EPA's stated position on existing stocks, nor may EPA prohibit the presiding [ALJ] or the Environmental Appeals Board ('EAB') from addressing existing stocks as part of an initial or final decision." Mot. 1–2. Reckitt states its belief in the Motion that it was improper for EPA to state in the NOIC its determination as to whether existing stocks would be able to "sell through" if cancelled, and in any case, believes that such determination is wrong. Mot. 1.

On April 17, 2013, the Federal Register published a Notice issued by the undersigned announcing that objections had been filed to the Agency's NOIC and that a hearing had been requested. 78 Fed. Reg. 22,876 (Apr. 17, 2013).

On April 25, 2013, the Agency filed a Response to Reckitt's Motion ("EPA Response" and "EPA Resp."), asserting therein that it has the discretion to determine whether the existing stocks issue will be heard at the hearing requested by Petitioners. EPA Resp. 1. Reckitt filed a Reply Brief on May 31, 2013 ("Reckitt's Reply" and "Reply"), and the Agency filed a Surreply on June 7, 2013 ("EPA Surreply" and "Sur.").

On May 9, 2013, the undersigned issued an Order accepting for admission into the record an amicus curiae brief filed by CropLife America ("CLA") dated April 26, 2013 ("CLA Brief" and "CLA Br.") in support of Reckitt's Motion, as well as the Agency's opposition to the CropLife Brief dated May 6, 2013 ("EPA Opp.").

On May 22, 2013, the undersigned accepted into the record a brief filed by Petitioners Do it Best Corp., Louisville Apartment Association, and Greater Cincinnati Northern Kentucky Apartment Association, in support of Reckitt's Motion, dated May 13, 2013 ("Retailer and Users' Brief" and "R&U Brief").

On May 28, 2013, the undersigned granted the motions to intervene of American Bird Conservancy, Center for Biological Diversity, Defenders of Wildlife, Sierra Club, Natural

Resources Defense Council, and West Harlem Environmental Action. By that Order, the undersigned also accepted into the record the amicus curiae brief of the American Chemistry Council Biocides Panel dated May 22, 2013 ("ACC Brief"). On May 31, 2013, the Agency filed a response to the Retailer and Users' Brief and the ACC Brief ("May 31 Resp.").

II. ARGUMENTS OF THE PARTIES

A. Reckitt's Motion

In its Motion, as background, Reckitt represents that the Agency has deliberately tried to prevent it from obtaining a hearing on the proposed rodenticide cancellations for years. Mot. 2. Reckitt states, "EPA initially sought to effect a *de facto* cancellation . . . by threatening enforcement actions against any registrant who did not comply with the Agency's 2008 Risk Mitigation Decision ('RMD')." *Id*. When that effort failed, Reckitt argues, EPA issued the instant NOIC, "but now seeks to punish Reckitt . . . and to penalize retailers . . . by refusing to allow the sale and distribution of existing stocks in the event of cancellation." Mot. 3. By stating in the NOIC that the fate of existing stocks is not within the scope of this hearing, Reckett argues, EPA is again barring it from obtaining the benefit of the hearing process to which it is entitled. *Id*. The Agency's determination on the existing stocks issue is "contrary to applicable law, prior EPA practice and previous decisions of this Tribunal." *Id*. Further, it constitutes an overreach of the Agency's authority and is "an attempt to intimidate retailers who may lawfully continue to stock the Subject Products pending the outcome of a hearing," Reckett declares. *Id*.

i. Reckitt is Entitled to a Hearing on the Existing Stocks Issue by Law and Regulation

As to the merits of its Motion, Reckitt argues first that it has a "statutory right" to a hearing on the disposition of existing stocks. Mot. 3. By including its existing stocks determination in the NOIC, EPA made it subject to objection by any party who would be adversely affected. Mot. 3-4 citing 40 C.F.R. §§ 164.20(a), 164.22(a). Reckitt and the other Petitioners requested a hearing and filed objections, in which each specifically objected to EPA's existing stocks determination. *Id*. Under FIFRA Section 6(d), "issues raised by the objections filed by the applicant" are within the scope of a Section 6(b) hearing. Mot. 3; 7 U.S.C. § 136d(b), (d). Therefore, Reckitt argues, its objections on the existing stocks issue fall within the scope of this hearing. Mot. 4. In support, Reckitt states that the regulatory history of the procedural rules that govern this proceeding, set forth at Subpart B of 40 C.F.R. Part 164[1] ("Rules"), shows that "hearings initiated under Section 6(b) are intended to address issues raised in the NOIC and the objections filed in response." *Id.* (citing 37 Fed. Reg. 9,476, 9,477 (May 11, 1972) ("The issues to be considered in the hearing are defined by the order of cancellation or suspension or denial of registration and the objections thereto filed by the registrant or applicant.")).

[1] Part 164 is titled, Rules of Practice Governing Hearings, Under [FIFRA], 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.

Second, Reckitt argues that it is entitled to a hearing on the EPA's existing stocks determination because it will be "adversely affected" by such determination, and the Rules state that a proceeding shall be commenced "whenever a hearing is requested by a person adversely affected by" an NOIC. Mot. 4; 40 C.F.R. § 164.20(a). Reckitt would be adversely affected because it will have an unsellable product "for which it would have to arrange proper disposal, which would be expensive and time consuming for Reckitt and its customers." Mot. 4. Also, Reckitt states it would be adversely affected because, even if not within the scope of this hearing, EPA's existing stocks determination "would deter Reckitt's retailers and consumers from purchasing" its products, which "could have negative long-term effects" on Reckitt regardless of the ultimate outcome of the proceeding. Mot. 5.

ii. EPA Lacks Authority to Exclude the Existing Stocks Issue from the Hearing

In further support of its Motion, Reckitt thirdly argues that EPA lacks the authority to exclude the existing stocks question from the scope of the hearing. Mot. 5–6. In support, Reckitt cites the following language from a 2008 ruling issued by the undersigned in a matter governed by Subpart D of the Rules:

> A Notice of Hearing, or an amendment thereto, is merely an announcement of an event and related information and has no binding legal effect. . . . [T]he regulatory requirement of the Administrator "to *specify* . . . the issues of fact and law to be adjudicated at the hearing," . . . does not empower the Administrator to exempt adjudication of issues through the Notice of Hearing procedure that are to be adjudicated under applicable law and regulations.

Request to Reduce Pre-Harvest Interval for EBDC Fungicides on Potatoes, EPA Docket No. EPA-HQ-OPP-2007-0181, slip op. 13, 2008 EPA ALJ LEXIS 1 (ALJ Jan. 16, 2008) (Order Regarding Scope of Hearing) ("*EBDC*"); Mot. 5–6.

iii. The ALJ is Authorized to Determine the Scope of the Hearing

Reckitt next argues that the ALJ may issue an order stating that the existing stocks determination *is* within the scope of the hearing, regardless of what EPA set forth in the NOIC. Mot. 6. In support, Reckitt cites 40 C.F.R. § 22.4(c)(7) and 40 C.F.R. § 164.40(d), which states that the ALJ is authorized to "hear and decide questions of facts, law, or discretion" and "to take actions and decisions in conformity with the statute or in the interests of justice." *Id*. Reckitt argues that any statements contained in the NOIC about the role of the ALJ are "merely an advocate's position in the litigation," and that if the Agency, which is charged with investigations and prosecutions, could also issue binding declarations about scope in the NOIC, "that practice would violate the 'separation of functions' principle embodied in 5 U.S.C. § 554(d). Mot. 6–7 (citing *EBDC* at 6).

Reckitt adds that "EPA's attempt to bar Reckitt from disputing its existing stocks determination is a transparent effort to unjustly punish Reckitt . . . for exercising its statutory right to a cancellation hearing." Mot. 8. Demonstrating EPA's "punitive and coercive intent" is illustrated by EPA's recent decision to grant "generous sell-through periods" to two rodenticide

registrants who voluntarily cancelled their registrations that otherwise would have been challenged in the NOIC, it asserts. *Id*.

iv. EPA's Position on the Scope of Hearing is Inconsistent

Finally, Reckitt argues that EPA's position on the scope of the hearing is inconsistent with prior Agency interpretation. Mot. 9. First, Reckitt seeks to distinguish the present question from that posed in *In re Cedar Chemical Co.*, 1988 EPA App. LEXIS 49, 2 E.A.D. 584 (Administrator 1988) ("*Cedar Chemical*"), in which a hearing on existing stocks was denied. *Id.* While in that case, a non-registrant intervenor sought a hearing on an issue absent from the NOIC, here, Reckitt is the sole registrant of the rodenticides at issue, seeking a hearing on an issue explicitly addressed in the NOIC. Mot. 10. Further, Reckitt is not seeking to expand the scope of the hearing, as the intervenor was in *Cedar Chemical*. Mot. 10–11. The interest being protected in that case – that all parties had fair notice at the outset of a proceeding what the issues would be – is not an issue in this matter, because all the parties were put on notice upon reading the NOIC as to EPA's intentions regarding the distribution of existing stocks, it asserts. Mot. 11.

Reckitt also argues that the Administrator's position set forth in an Order on Interlocutory Appeal in *In re Shell Oil Co.*, 1979 EPA App. LEXIS 8, 1 E.A.D. 517 (Administrator 1979) ("*Shell Oil*"), supports Reckitt's argument that the Agency made its existing stocks determination an issue for the hearing when it included it in the NOIC. Mot. 11–12. The Administrator stated in that Order that the NOIC "provid[es] a framework for the remainder of the proceeding" and "it 'set[s] a standard of relevance which shall govern the proceedings at the hearing.'" 1 E.A.D. at 523-24 (second alteration in original); Mot 11–12. Reckitt interprets this assertion to mean that "if the NOIC contains an existing stocks determination, objections to that determination fall squarely within the scope of a Section 6(b) hearing requested by an adversely affected party." Mot. 12 (also citing in support *EBDC* at 10).

Moreover, Reckitt points to a 1988 NOIC in which EPA stated its determination to prohibit the sale of existing stocks of certain inorganic arsenicals that it sought to cancel. Mot. 13; 53 Fed. Reg. 24,787, 24,794–95 (Jun. 30, 1988). In the NOIC, Reckitt explains that although "EPA did not specify whether the existing stocks determination could be challenged in a hearing by parties that were opposing the cancellations," the Chief Judicial Officer considered and ruled on that issue. Mot. 13 (citing *Protexall Prods., Inc.*, 1989 EPA App. LEXIS 54, 82–84, 2 E.A.D. 854, 890–91 (CJO 1989)). Reckitt also states that in a 1982 NOIC, EPA explicitly included the existing stocks issue within the hearing after it set forth its determination about whether they could be sold: "The 30-day time period in which to request a hearing is applicable to all the regulatory actions proposed in this Notice, including the immediately effective cancellations; . . . the existing stocks provisions; and the denial of applications." *Id*.; 47 Fed. Reg. 53,784, 53,792–93 (Nov. 29, 1982). Reckitt argues in summary that prior EPA practice and decisions "establish that, contrary to EPA's assertions, merely including an existing stocks determination in a NOIC is sufficient to bring it within the scope of a hearing when a registrant timely files an objection to it." Mot. 13.

B. EPA's Response

The Agency begins its Response to Reckett's Motion by explaining that it decided not to include the issue of existing stocks within the scope of the hearing "primarily because [it] is not relevant to the question of whether the d-CON products . . . meet the criteria for registration under FIFRA, because the continued sale and distribution of these products . . . would continue to cause unreasonable adverse effects . . .and because Reckitt has been on notice since at least 2008 . . . that these products do not meet the criteria for registration under FIFRA." EPA Resp. 2. The Agency then asserts that each of Reckitt's arguments in the Motion is without merit, and the Motion should be denied.

i. The Administrator's Holding in *Cedar Chemical* Governs

The Agency begins its rebuttal citing the Administrator's holding in *Cedar Chemical* that "FIFRA does not confer any hearing rights on opponents of an existing stocks determination. Hearing rights in a cancellation proceeding are conferred by FIFRA §§ 6(b) and (d), whereas existing stocks determinations are made under FIFRA § 6(a)(1), which vests broad discretion in the Administrator . . . ." EPA Resp. 3; 2 E.A.D. at 587-88 n.7. The Administrator acknowledged that existing stocks could be included in a cancellation hearing, but that would be "limited to situations in which the notice calling the hearing voluntarily identifies and includes existing stocks as an issue for examination." 2 E.A.D. at 588 n.9; EPA Resp. 3. The Agency argues that Reckitt's interpretation of *Cedar Chemical* "conflates two separate holdings to create the appearance of supportive authority" for its position. EPA Resp. 4 n.3.

Further, the Administrator has "never changed that interpretation" set forth in *Cedar Chemical*, the Agency asserts. EPA Resp. 4. Therefore, the holding is "binding on the Administrator's subordinates and delegatees, including this tribunal." *Id*. The Agency adds, the Ninth Circuit reviewed *Cedar Chemical* and held that the Administrator's "construction of FIFRA's notice requirement . . . is reasonable and, therefore controlling." *Id.*; *Nw. Food Processors Ass'n v. Reilly*, 886 F.2d 1075, 1078 (9th Cir. 1989), *cert. denied* 497 U.S. 1004 (1990) ("*Northwest Food*"). It also cites the following in support: "Once the agency has ruled on a given matter . . . it is not open to reargument by the administrative law judge . . . ." Joseph Zwerdling, *Reflections on the Role of an Administrative Law Judge*, 25 ADMIN. L. REV. 9, 12–13 (1973) (cited with approval in *Iran Air v. Kugelman*, 996 F.2d 1253, 1260 (D.C. Cir. 1993)); EPA Resp. 5 n.

EPA later argues that the ALJ must interpret the NOIC to determine scope only when an NOIC is unclear. EPA Resp. 9. Otherwise, the ALJ's "jurisdiction . . . is limited to the . . . intersection of the issues presented in the NOIC and the objections presented in the request(s) for hearing." EPA Resp. 10.

ii. The NOIC Sets the Scope of a Proceeding

Second, the Agency argues that the Judicial Officer in *Shell Oil* "expressly rejected the contention that a party's objections filed in association with its request for hearing could expand the scope of the proceeding to include matters not contained in the [NOIC]." EPA Resp. 6–7; 1

E.A.D. at 524 ("Although the language of Section 6 does not expressly provide that the parties' objections must be relevant to the matters raised in the [NOIC], such a limitation on the right to file objections is necessarily implied. . . . Under Section 6(b), the authority to issue a [NOIC], and hence, set the standard of relevance, is expressly reserved to the Administrator [or his delegate] . . . however, there is no provision in the Act authorizing such notice to be issued by private parties."). EPA claims that while the objections raised by Petitioners are important in defining the scope of the hearing, their "impact is confined within the outer bound established in the NOIC." EPA Resp. 7.

Reckitt's interpretation of Section 6(d) (the hearing shall be "for the purpose of receiving evidence relevant and material to the issues raised by the objections filed by the applicant or other interested parties"), to the effect that it permits the Petitioners to include existing stocks as an issue for the hearing, usurps the authority of the Administrator and her Agency delegate in this case. EPA Resp. 7–8. The words "relevant and material" in that provision "necessarily relate[] back to the essential purpose of the proceeding," which is to determine whether the rodenticide causes unreasonable adverse effects. EPA Resp. 8; 7 U.S.C. § 136d(b). "Nothing in Sections 6(b) or 6(d) suggests that existing stocks of cancelled pesticides are relevant to a cancellation proceeding," the Agency argues. EPA Resp. 8. Instead, like with Sections 6(c), 6(e), 6(f), and 6(g), the authority over existing stocks assigned to the Administrator in 6(a) is "wholly irrelevant to, and outside the scope of, a hearing under sections 6(b) and 6(d)." *Id*.

The requirement in the Rules for specific objections from petitioners was not designed "to invite expansion of the issues in the proceeding but rather to clarify" whether it is necessary to hear all the issues identified in the NOIC, the Agency argues. EPA Resp. 8; 40 C.F.R. § 164.22(a). In other words, the "clear[] and concise[]" objections can serve to narrow, but not expand, the scope of the hearing. *Id*.

As to Reckitt's argument based on the language in *EBDC* that the NOIC has no "binding legal effect," the Agency admits that it is not binding as a law or regulation is binding, but counters, "nevertheless, the issuance of the NOIC does have a concrete legal effect in that it triggers certain legal rights and obligations that are enforceable at law." EPA Resp. 9; *EBDC* at 13. For example, failure to request a hearing on an NOIC leads to automatic cancellation. EPA Resp. 9. Regardless, the *EBDC* case involved a Subpart D proceeding, not a Subpart B proceeding as here, and is therefore not controlling precedent, the Agency asserts. EPA Resp. 9 n.5.

Further, the Agency charges that Reckitt, in its arguments, "improperly denies the institutional expertise and authority of the Assistant Administrator" whose "positions must be given some measure of deference . . . ." EPA Resp. 10 n.7. The ALJ is "obliged to respect the texts she interprets and is prohibited from substituting her own judgment for that of the institutional authors." EPA Resp. 10. Notably, the Agency suggests that:

> If it were the case that the NOIC were silent or ambiguous in regard to existing stocks of cancelled products, and could reasonably be interpreted as placing in question the disposition of existing stocks, then the ALJ would indeed have the

authority to issue an order that the disposition of existing stocks is within the scope of the proceeding.

EPA Resp. 11. In sum, the Agency decries that Reckitt is asking the undersigned "to disregard the express, unmistakable intent of the Respondent as to a policy decision duly delegated to Respondent, and instead adopt a different policy choice." *Id.*

iii. Reckitt's Other Arguments Lack Merit

As to Reckitt's assertion that the Agency included the issue of existing stocks in this proceeding when it specifically discussed its determination in the NOIC, EPA contends that it did so because the public interest is served when the scope is set out in the NOIC "clearly and unambiguously." EPA Resp. 10–11. The NOIC language stating that the issue is outside the scope of the hearing does not achieve the opposite and bring it into the proceeding, "any more than a judge's consideration of scope issues by itself expands the proper scope of a proceeding," the Agency argues. EPA Resp. 11. Further defending its decision to include the existing stocks determination in the NOIC, EPA states that if Petitioners had not requested a hearing, the subject products would have been automatically cancelled thirty days after the NOIC was issued. *Id.* If the Agency had not set forth its determination on existing stocks in the NOIC, it argues, affected persons would not have been prepared for the outcome. *Id.*

Reckitt's assertion that 40 C.F.R. § 164.20(a) means that a hearing necessarily involves the issues that affect Reckitt adversely, the Agency argues, misconstrues a procedural provision that implies nothing about scope and cannot be construed to grant an independent right to a hearing on the issue. EPA Resp. 13.

The Agency then challenges Reckitt's reliance on the undersigned's order in *EBDC*. *Id.* First, that proceeding, a reconsideration hearing, was subject to "statutory and regulatory provisions fundamentally different from the instant action," as in FIFRA Section 3 and Subpart D of Part 164, not FIFRA Section 6(b) or Subpart B of Part 164, it states. EPA Resp. 13–14. The language in Subpart D upon which the order was based "has no counterpart in subpart B that could reasonably support Reckitt's position," and therefore should not be considered as informing the present ruling. EPA Resp. 14. The Agency argues further that the *EBDC* matter is "factually unrelated and analytically distinct" from the facts and issues here. *Id.*

iv. The Agency's Position is Consistent with Prior Agency Actions

EPA additionally argues that FIFRA, by operation of Section 12, "establishes a default position that cancellation not only terminates the registration but also terminates distribution or sale of existing stocks of cancelled products, except where the Administrator expressly authorizes their distribution or sale." EPA Resp. 16; 7 U.S.C. § 136j. Congress' intent is therefore being carried out by the NOIC determination on existing stocks. EPA Resp. 16–17.

Second, its position on existing stocks is consistent with the Agency's Statement of Policy on Existing Stocks of Pesticide Products, 56 Fed. Reg. 29,362, 29,363 (June 26, 1991) ("Policy"). EPA Resp. 17. The Policy prohibits the sale of existing stocks when such sale or

distribution would cause unreasonable adverse effects on the environment, the Agency argues, which is exactly the Agency's position regarding the products in question. *Id*. The Policy also states that "the Agency is unlikely to allow continued sale or distribution (and quite possibly, use) of the cancelled pesticide" when the pesticide was cancelled after a Section 6(b) hearing. *Id*.; 56 Fed. Reg. at 29,365.

Third, Reckitt's claim that EPA's determination is merely punitive is inconsistent with the facts, it asserts, because the prohibition on existing stocks cannot take effect until a final decision that the products pose unreasonable risks. EPA Resp. 18. The Agency's determination is not arbitrary; it has a responsibility to protect human health and the environment. *Id*. Reckitt chose not to voluntarily cancel its registrations when offered the opportunity to do so by the Agency along with the other registrants, who, as a condition of their voluntary cancellations, were permitted to sell their existing stocks. *Id*. 18–19.

Finally, the Agency refutes Reckitt's argument that its current position is inconsistent with that set forth in previously issued cancellation notices. EPA Resp. 21. EPA does not disagree that the Agency *could* include existing stocks issues in the scope of a cancellation hearing if it wanted, or that it has done so before. *Id*. However, it is "unreasonable to construe EPA's prior exercise of its discretion" as an obligation going forward in every case. *Id*. Plus, the NOICs cited by Reckitt are very old, and there are not a sufficient amount issued recently to constitute a pattern of the Agency's practice. *Id*. Furthermore, because the circumstances underlying previous determinations set forth in NOICs are not in evidence, comparisons between them and the present NOIC are superficial, speculative, or both. *Id*. 22.

In summary, the Agency argues that the Administrator determined in *Cedar Chemical*, and the Ninth Circuit affirmed, that FIFRA does not create a right to a hearing on the disposition of existing stocks of cancelled products. *Id*. 22-23. Pursuant to *Shell Oil*, that issue can only be heard in the cancellation proceeding when the Agency says so in the NOIC. *Id*. 23. Therefore, the Motion must be denied.

C. Reckitt's Reply

Reckitt reiterates in its Reply its argument that FIFRA Section 6(d) explicitly states that the scope of the hearing includes "issues raised by the objections filed by the applicant." Reply 3; 7 U.S.C. § 136d(d). This has been EPA's longstanding position since 1972, Reckitt writes. Reply 3 n.2. The Agency is not entitled to any deference as to determining the scope, Reckitt argues, because the statute is unambiguous; the NOIC is an interpretation akin to a legal brief and not adjudication; and the Agency's expertise in pesticide regulation is irrelevant to this present question of scope. Reply 5–6 (citing, inter alia, *Chevron v. Natural Resources Defense Council*, 467 U.S. 837 (1984)).

Next, Reckitt asserts that the ALJ alone has the authority to set the scope of the hearing. Reply 4. Even though the procedural rules set forth at 40 C.F.R. Part 164 govern this proceeding, the rules at 40 C.F.R. Part 22 are still "pertinent in evaluating the general authority of the ALJ," and they authorize the ALJ to "[h]ear and decide questions of facts, law, or discretion." Reply 4; 40 C.F.R. § 22.4(c)(7). Further, Part 164 authorizes the ALJ "to take

actions and decisions in conformity with the statute or in the interests of justice." Reply 4; 40 C.F.R. § 164.40(d). For additional support, Reckitt cites the *EBDC* opinion: "[i]f an allegation is made that the Administrator's delegate abused his discretion in making a determination . . ., the ALJ has authority to rule on the allegation." Reply 5. Contrary to the Agency's claim that the *EBDC* case is not on point because it is governed by a different Subpart of the Rules at Part 164, Reckitt argues that "the ALJ's conclusion in *EBDC* on this issue was rooted in the Administrative Procedure Act (APA)," and therefore, the difference is meaningless. Reply 5 n.4.

Reckitt again argues that the holding in *Cedar Chemical* that the Agency relies upon is distinguishable from the present case because the NOIC in that matter did not address the issue of existing stocks at all. Reply 7. Further, the opinion actually favors Reckitt, it argues, citing the following excerpt: "Obviously, if an issue is identified in the cancellation notice, it fits within the framework of the proceeding and may be litigated . . . ." *Id*.; 2 E.A.D. at 558 n.9. Further, nothing in *Cedar Chemical* or any other authority "supports the proposition that the public hearing provisions of Section 6(d) do not apply to some portions of a Section 6(b) notice merely because the Agency arguably could at some point implement those portions of the notice under separate authority." Reply 8.

Reckitt also argues that EPA admits to the ALJ's authority to determine scope in a brief that it filed with the U.S. Court of Appeals for the Tenth Circuit in a proceeding Reckitt initiated, when it stated: "The Agency's decisions regarding the cancellation . . . including the scope of the cancellation hearing itself, will not be final . . . until the [ALJ] issues an initial decision that becomes final . . . or the Environmental Appeals Board issues a final decision, concluding the administrative hearing process." Reply 10, Ex. A at 5 (Respondent's Memorandum Brief in Response to the Court's Order Regarding Jurisdiction in *Reckitt Benckiser LLC v. EPA*, No. 13-9543 (10th Cir. 2013)).

Reckitt argues that "the availability of sell-through of existing stocks is relevant to – and an important part of – the risk-benefit analysis in the Section 6 hearing." Reply. 11. The calculus might depend on "whether there is a reasonable regime for transitioning to alternative products (if any); what the effects on public health would be if the products are immediately prohibited following cancellation; the training period for applicators, users of alternative products, poison control centers, and veterinarians; etc. Reply 11–12 (citing FIFRA Section 2(bb), 7 U.S.C. § 136(bb)). If the existing stocks issue is excluded from the cancellation hearing, Petitioners will be deprived of an opportunity to submit information relevant to the risk-benefit analysis at the heart of the matter, Reckitt argues. Reply 12.

Next, Reckitt states that other sections in FIFRA reference existing stocks in the context of the scope of other kinds of abbreviated hearings. Reply 13. However, Section 6(b) does not limit the scope as those sections do, thus reflecting the intention of Congress that Section 6(b) hearings should not be limited. Reply 13–14. Reckitt cites legislative history to support this argument, wherein an amendment was rejected that purportedly would have given the Agency more control over Section 6(b) hearings. Reply 14 n.9 (118 Cong. Rec. 32248-32263 (1972)).

Finally, Reckitt argues that the Agency's existing stocks determination set forth in the NOIC is arbitrary and capricious. Reply 14-15. EPA's own policy mandates that the Agency

conduct a risk-benefit analysis when considering whether to ban existing stocks of a cancelled product, and the Agency has not done so, Reckitt advises. Reply 15 (citing the Policy as amended, 61 Fed. Reg. 16,632, 16,633 (Apr. 16, 1996)). The information necessary to conduct the analysis is not even available until and unless a registered product is cancelled. Reply 15–16. The fact that the analysis for determining the fate of existing stocks is separate and apart from the analysis for determining whether a product should be cancelled refutes the Agency's argument that a prohibition of sell-through is the "default" position set by Congress, Reckitt argues. Reply 16–17.

D. <u>The Agency's Surreply</u>

The Agency summarizes: (1) FIFRA does not create any right to a hearing on existing stocks (*Cedar Chemical*); (2) the NOIC clearly excludes the issue; (3) the scope of a Section 6(b) hearing is no broader than the scope established by the NOIC (*Shell Oil*); and (4) whether EPA's existing stocks determination in the NOIC is arbitrary and capricious is irrelevant to the present Motion and also inaccurate. Sur. 3.

As to the ALJ's authority in this proceeding, the Agency asserts that the ALJ is authorized to adjudicate disputes regarding the scope of a Section 6(b), which is not the same as being authorized to choose the scope of such proceeding. Sur. 4. Under Reckitt's reasoning, the ALJ could expand the scope of the proceeding to include other products, other ingredients, etc., and any issue in the objections filed would have to be heard. *Id*.

Shell Oil stands for the proposition that the NOIC "does have concrete legal effects as it triggers certain legal rights and obligations that are enforceable at law," and it sets the standard of relevance that governs the proceeding, the Agency argues. Sur. 4–5; 1 E.A.D. 517, 523–24. Petitioners may attenuate the scope of the proceeding, but may not expand it beyond what the Agency stated the issues would be for hearing in the NOIC. Sur. 5.

As to Reckitt's claim that EPA's position here contradicts the argument it presented to the Tenth Circuit, the Agency argues that in that case it was merely stating its belief that no issue in this proceeding, whether about scope of the hearing or any other ruling, will be ripe for judicial review until the decision is final. Sur. 6.

Next, the Agency challenges Reckitt's argument that the issue of existing stocks is relevant to the cancellation question. Sur. 7. A Section 6(b) proceeding is a "licensing action," and the existing stocks question arises only after that action has taken effect and the product has been cancelled. Sur. 7–8. Similarly, EPA asserts, "the risks and benefits of various sentencing options have no influence on the determination of whether a person has or has not committed a crime." Sur. 8.

EPA further clarifies that it has not "banned" anything by its declaration in the NOIC; "it has merely announced its intentions with respect to a potential future action." Sur. 9–10. The Agency asserts that it had notified Reckitt of such intention even prior to issuing the NOIC. Sur. 10–11. Further, because there is no "ban" and the Agency has merely given notice of its

intention, Reckitt's assertion that EPA has taken a specific action that is arbitrary and capricious is unfounded. Sur. 13.

As to Congress specifically including existing stocks as an issue in other, "simpler" types of FIFRA proceedings, the Agency distinguishes these cases from Section 6(b) proceedings where existing stocks must have already been determined to cause unreasonable risk to health or the environment. Sur. 11–12. "[P]roducts suspended or cancelled solely for failures to meet data requirements," like in other FIFRA hearings, "have not." Sur. 11. EPA argues, "it seems reasonable that Congress would choose not to provide the same right to a hearing that it provided for products that have been suspended or cancelled for reasons other than risk." Sur. 12.

The Agency adds that granting Reckitt's Motion would "necessarily result in a longer proceeding" on issues irrelevant to the cancellation question, which would therefore prolong the amount of time that the contested products are produced and sold. Sur. 12. This would be bad public policy. *Id.*

E. Retailer and Users' Brief

Many of Retailer and Users' arguments have also been proffered by Reckitt, so only a select number will be recounted here.

Retailer and Users argue that the Agency has not conducted the detailed risk-benefit analysis that FIFRA and its existing stocks policy mandate must be completed before an existing stocks determination is made. R&U Br. 3. Such failure "is itself justification to place this issue squarely before the ALJ." *Id*. 4.

Specifically in contravention of the existing stocks policy, the Agency has not sought information about existing stocks issues, even though it claims to have notified Reckitt in 2008, and arguably a decade before in 1998, about its intentions to remove its registrations, Retailer and Users assert. *Id*. Some of this required information, such as the quantity of existing stocks in trade, "can be determined only at the time that the ALJ makes a cancellation decision." *Id*. Therefore, EPA's position as stated in the NOIC "is at best unsupported by necessary evidence and at worst retaliatory." *Id*. This is "arbitrary and capricious Agency behavior that requires review by the ALJ," Retailer and Users state. *Id.* They also argue that the sell-through question is relevant to the benefits analysis required in the cancellation proceeding. *Id*.

Retailer and Users argue that *Cedar Chemical* is distinguishable from the present case because the cancellation notice in that case made no mention of an existing stock determination. *Id*. 6. Also, they argue, as Reckitt has, that Petitioners may obtain a hearing on the existing stocks issue because the Agency itself incorporated the issue for hearing when it stated its determination in the NOIC. *Id*. 7.

If the Motion were to be denied, there would be no opportunity for public comment on, or administrative review of the Agency's existing stocks determination, Retailer and Users argue. *Id*. 9. Interested parties "would have no alternative but costly federal court litigation." *Id*. This contravenes the purpose or intent of FIFRA. *Id*.

Further, "EPA has failed to justify its disparity between its recent treatment of parties that settled with EPA . . . and its treatment of Reckitt." *Id*. Specifically, Retailer and Users note that EPA agreed with the settling parties as to the following sell-through dates: retailers "have unlimited sell-through rights for Liphatech's products," Spectrum was able to sell-through its existing stocks until November 1, 2013, and its retailers are able to sell-through their existing stocks until September 1, 2014 (or untilthe date Reckitt's products can no longer be sold). *Id*. 9–10. They assert that the agreements with these other parties are evidence that EPA has sought to punish Reckitt. *Id*. 10.

F. EPA's Response to Retailer and Users' Brief

The Agency asserts in response to Retailer and Users' Brief that it is not required to perform a risk-benefits analysis of its existing stocks determination in the NOIC. May 31 Resp. 4. The contested statement therein, because it is conditioned on the outcome in this proceeding of the products being cancelled, "is necessarily provisional, advisory, and not a final agency action." *Id*. Petitioners have failed to identify any provision of law requiring EPA to conduct a risk-benefit analysis before making "a statement of future intent" such as this one. *Id*. Even if there were, a failure to conduct such analysis "would not influence whether a registrant has a right to a formal administrative adjudication" regarding existing stocks. *Id*. 3–4.

EPA further reiterates part of its rebuttal from previous filings: "In an attempt to distinguish *Cedar Chemical*, Petitioners mischaracterize Respondent's pre-hearing intentions regarding the prospective disposition of existing stocks of cancelled product as final agency actions with binding legal effect." *Id*. 5. Just because the statement of EPA's intentions was set forth in the NOIC does not mean that it is automatically an issue for hearing. *Id.*

Third, it argues that Retailer and Users' contention that "Congress would not have allowed EPA how to treat existing stocks of a cancelled pesticide without also subjecting that decision process to formal administrative adjudication – is unsupported by the statutory text and contrary to the applicable case law" already cited. *Id*. 6.

Fourth, the Agency challenges the sincerity and accuracy of Retailer and Users' claims that EPA is treating Reckitt unfairly and punitively, pointing out that as retailers and users of the products at issue, it is "curious" that they would complain about other manufacturers being able to continue to sell their existing stocks. *Id*. And, as Respondent argued previously, similar terms of "compromise" were available to Reckitt before the NOIC was issued, but it chose litigation instead. *Id*. 6-7.

III. ARGUMENTS OF THE AMICI

A. CropLife America (CLA)

i. CropLife America's Brief

In its Brief, CLA argues that Congress intended the scope of FIFRA Section 6(b) hearings to be "broad and inclusive" and "objections-based." CLA Br. 5. A letter authored by an EPA official in the legislative record of FIFRA amendments made in 1972 makes clear that it is the "obligation of 'registrants and user groups to raise at the hearing' the question of existing stocks." *Id*. 6. The letter cited by CLA reads in pertinent part:

> It is open to registrants and user groups to raise at the hearing any question bearing on the benefits of using a product. Any showing of need for a pesticide during an upcoming season would be relevant and the statute would permit us to issue an order that would result in a label use for a given season or period of time or indeed in a certain geographical location.

S. Rep. No. 92-838 at 13-14 (May 10, 1972 letter from David Dominick (EPA) to Senator Henry Bellmon); CLA Br. 5.

Further amendments to FIFRA in 1978 included Section 6(e) hearings to cancel conditional registrations, and Section 3(c)(2)(B) hearings to suspend conditional registrations, CLA explains. CLA Br. 6. For both, the issues were specifically limited to two issues, including "whether the Administrator's determination with respect to the disposition of existing stocks is consistent with this subchapter." *Id*. By design, these proceedings are narrow in scope, and, Reckitt argues, by design, Section 6(b) hearings are broad in scope. *Id*. 6–7.

ii. EPA Response to CLA's Brief

It is "unremarkable," the Agency asserts, that an EPA official said that it is "open to registrants and users to raise at the hearing any question bearing on the *benefits* of using a product," because a Section 6(b) hearing explicitly includes a risk-benefit analysis. EPA Opp. 2–3 (emphasis added). It is the risk and benefits of continued registration that are relevant to the question of whether the pesticide should be cancelled, not the risks and benefits "associated with whatever post-cancellation use that might subsequently be allowed." *Id*. 3. The flexibility referred to by the EPA official in the letter is confirmed by the Agency's existing stocks policy, it asserts. *Id*. 3–4 n.1 citing Existing Stocks of Pesticide Products Statement of Policy, 56 Fed. Reg. 29362 (June 26, 1991).

As to the types of abbreviated proceedings that CLA compares to the present 6(b) proceeding, the Agency finds nothing peculiar about Congress' choice to include existing stocks in those hearings and not state similarly that they are included in this kind. *Id*. 4. EPA reasons that unlike the rodenticides at issue in this proceeding, products cancelled pursuant to Section 6(e) or suspended pursuant to Section 3(c)(2)(B) "are generally not expected to pose unreasonable risks to health or the environment." *Id*. Specifically, those are proceedings

initiated because of "the *registrant's* failure to meet its obligations, and not about a problem with *the pesticide product itself*." *Id*. 4 n.2. In contrast, products cancelled pursuant to Section 6(b) "have been determined to pose unreasonable risks to man or the environment" such that they must be removed from commerce. *Id*. 5. This fundamental difference in risk, the Agency concludes, "fully warrants a statutory scheme where (1) existing stocks of products cancelled owing to unreasonable risk will not be allowed to be distributed or sold, except pursuant to the Administrator's discretionary authority . . . and (2) the disposition of existing stocks of products cancelled or suspended for procedural reasons unrelated to risk will be determined by an [ALJ], or the [EAB] on appeal." *Id*. 6.

B. American Chemistry Council Biocides Panel (ACC)

i. ACC's Brief

ACC argues that the "risk/benefit considerations" required by the Agency's existing stocks policy before a determination is made as to the existing stocks of a cancelled product should be among the subjects considered by an ALJ in a Section 6(b) cancellation hearing. ACC Brief 3-4. ACC states what the Petitioners and CLA have already argued – that "without the prospect of review, EPA has license to make existing stocks decisions without adequately considering the relevant factors." *Id*. 4. Citing the *EBDC* order, the Administrative Procedure Act, and the Rules at Part 164, ACC asserts that the ALJ has the authority to determine what issues are properly within the scope of this hearing. *Id*. 4–5.

Building on the allegations previously made by Petitioners and CLA, ACC asserts that the Agency "seeks to reward registrants who forgo statutory rights and punish those who exercise those rights," which is inconsistent with FIFRA. *Id*. 5. EPA "risks chilling the use of procedural rights that Congress expressly provided to FIFRA registrants," ACC argues. *Id*. If the determination on existing stocks is made outside of a Section 6(b) hearing, there is a higher likelihood that "undue economic burdens" will fall on registrants, distributors, retailers and users of the cancelled products, ACC asserts. *Id*. 5–6.

ii. EPA's Response to ACC's Brief

In EPA's May 31 Response, it challenges ACC's first argument as being essentially "a policy argument for why the law should be different than it is." May 31 Resp. 8. Furthermore, the Agency states, the policy arguments are not persuasive. *Id*. The administrative record for a cancellation proceeding should not be cluttered with the risks and benefits of any potential existing stocks distribution, because the latter issues are irrelevant to the former question. *Id*. Adding such issues would only delay a final decision about whether the products meet FIFRA Section 3(c)(5) registration criteria. *Id*. Such delay might meet the interests of registrants, but does not benefit human health and the environment, the Agency argues. *Id*. 8–9.

Further, as to ACC's argument that administrative review of the Agency's position on any potential existing stocks is necessary to prevent the Agency from acting arbitrarily and capriciously, it answers that this is not only not true, but is irrelevant to the main issue of a cancellation hearing – determining whether the products meet the criteria for registration. *Id*. 10.

IV. DISCUSSION

A. FIFRA and the Authority of the Administrator

The first rule of FIFRA is that no person may distribute or sell a pesticide that is "not registered." 7 U.S.C. § 136a(a) (Section 3: Registration of Pesticides); 7 U.S.C. § 136j(a)(1) (Section 12: Unlawful acts). Under FIFRA, the registration status of a pesticide may fall into one of several categories, e.g., not registered, unregistered with an application pending, registered, conditionally registered, unregistered due to suspension, or unregistered due to cancellation. In regard to each such status, a hearing process is made available if the pesticide manufacturer/distributor/seller is dissatisfied with the Agency's determination.

i. Denial of Application

An application to register a pesticide may be granted if the pesticide "will not generally cause unreasonable adverse effects on the environment" and if various other requirements are met. 7 U.S.C. § 136a(c)(5). If the Administrator finds that any requirements are not satisfied, she must notify the applicant and the public of the denial of the application for registration, and the applicant has the remedies in regard thereto provided in FIFRA Section 6, namely, a hearing before an ALJ. 7 U.S.C. §§ 136a(c)(6), 136d.

ii. Suspension of Conditional Registration

If the Administrator approves an application for registration, but requires the registrant to secure and submit additional data in order to maintain the registration pursuant to Section 3(c)(2)(B), and the registrant does not timely meet this obligation, the Administrator may notify the registrant of its intent to suspend the registration. 7 U.S.C. § 136a(c)(2)(B)(iv). In such notice of its intent to suspend, the Administrator "may include . . . such provisions as the Administrator deems appropriate concerning the continued sale and use of existing stocks of such pesticide." *Id*. A hearing under Section 6(d) may be requested in response to such notice. *Id.* FIFRA states that at such hearing, the only matters for resolution will be whether the data requirements have been met "and whether the Administrator's determination with respect to the disposition of existing stocks is consistent" with FIFRA. *Id*.; 7 U.S.C. § 136d.

iii. Cancellation of Conditional or Amended Registration

If the Administrator conditionally registers or amends a pesticide registration pursuant to Section 3(c)(7), and determines that some condition of that registration or amendment has not been met, the Administrator may notify the registrant of its intent to cancel the registration. 7 U.S.C. §§ 136a(c)(7), 136d(e)(1). Any person adversely affected by such notice may request a Section 6(d) hearing. 7 U.S.C. §§ 136d(e)(2), 136d(d). Similar to the suspension hearings described above, the only matters for resolution at this kind of cancellation hearing will be whether the mandated conditions have been met "and whether the Administrator's determination with respect to the disposition of existing stocks is consistent" with FIFRA. *Id*.; 7 U.S.C. § 136d. Section 6(e) provides that in this kind of cancellation proceeding, "[t]he Administrator may permit the continued sale and use of existing stocks of a pesticide whose conditional

registration has been cancelled under this subsection to such extent, under such conditions, and for such uses as the Administrator may specify . . . ." 7 U.S.C. § 136d(e)(1).

iv. Change in Classification of Registration

The Administrator may also notify the registrant that he or she has determined to change the classification of a registered pesticide from general use to restricted use, and the registrant may seek relief from such determination under Section 6(b). 7 U.S.C. §§ 136a(d)(2); 136d(b).

v. Cancellation of Registration for Unreasonable Adverse Effects on Environment

At any time "it appears to the Administrator" that a pesticide that is already registered does not comply with the Act, or, "when used in accordance with widespread and commonly recognized practice, [it] generally causes unreasonable adverse effects on the environment," the Administrator may notify the registrant and the public of his or her intent to cancel the registration of that pesticide. 7 U.S.C. § 136d(b). Any person adversely affected by such notice of the Administrator's intent can request a hearing be held in accordance with Section 6(d). 7 U.S.C. § 136d(b), (d). That hearing shall be held "for the purpose of receiving evidence relevant and material to the issues raised by the objections filed by the applicant or other interested parties" and will result in a "decision pertaining to registration or classification." 7 U.S.C. § 136d(b). The Administrator, ninety days after the ALJ issues such decision, shall evaluate the record and "issue an order either revoking the Administrator's notice of intention . . ., or shall issue an order either canceling the registration, changing the classification, denying the registration, or requiring modification of the labeling or packaging of the article." *Id.*; 7 U.S.C. § 136d(d).[2]

vi. Actions Authorized by FIFRA Once a Registration is Cancelled or Suspended

Just as FIFRA authorizes the Administrator to issue a notice of denial (Section 3(c)(6)), a notice of intent to suspend (Section 3(c)(2)(B)(iv)), a notice of intent to cancel a conditional registration (Section 6(e)), a determination to change a registration's classification (Section 3(d)(2)), or, as in this case, a notice of intent to cancel for unreasonable adverse effects (Section 6(b)), the Act also, separately, authorizes the Administrator to determine whether and how existing stocks of suspended or cancelled pesticides can be used and sold. 7 U.S.C. § 136d(a). In pertinent part, Section 6(a)(1) reads:

> The Administrator may permit the continued sale and use of existing stocks of a pesticide whose registration is suspended or canceled under this section [(Section 6)], or section 136a [(Section 3)] or 136a-1 [(Section 4)] of this title, to such

[2] In Section 6(d), a distinction is made between the Administrator and the Hearing Examiner. 7 U.S.C. § 136d(d). The Rules clarify that "ALJ" is synonymous with "Hearing Examiner" as used in FIFRA, and that "Administrator" means the EPA Administrator. 40 C.F.R. § 164.2(b), (c); *see also* 7 U.S.C. § 136(b) ("Administrator" means the EPA Administrator). Powers granted to the "Administrator" in Section 6(a)(1) ("Existing Stocks"), and her delegates pursuant to Agency delegation manuals, cannot be imputed to the presiding ALJ.

> extent, under such conditions, and for such uses as the Administrator determines that such sale or use is not inconsistent with the purposes of this subchapter.

7 U.S.C. § 136d(a)(1).

There are a host of other actions the Administrator may take after products are suspended or cancelled. For example, as part of the Administrator's Section 6(d) final order of cancellation or suspension, she may issue requirements and procedures to be followed by any person who stores or transports the pesticide, a container of the pesticide, any rinsate containing the pesticide, or any other material used to contain or collect excess or spilled quantities of the pesticide, and she may issue requirements and procedures for the disposal of the pesticide. 7 U.S.C. § 136q(a)(2), (3). The Administrator can also issue a recall of pesticides that have had their registrations suspended or cancelled after a Section 6 hearing. 7 U.S.C. § 136q(b). Further, the Administrator could also "issue a written or printed 'stop sale, use, or removal' order to any person who owns, controls, or has custody of" a cancelled or suspended pesticide. 7 U.S.C. § 136k(a). Unregistered pesticides that are being transported, imported, sold, or offered for sale may be seized under 7 U.S.C. § 136k(b).

B. Determining the Scope of a Section 6 Cancellation Proceeding

The Rules that govern pesticide cancellation proceedings provide that "[a] proceeding shall be commenced whenever a hearing is requested by any person adversely affected by a notice of the Administrator of his *refusal to register* or of his *intent to cancel* the registration or to *change the classification* of a pesticide." 40 C.F.R. § 164.20(a) (emphasis added). Objections can be filed, the Rules provide, "to an order of the Administrator of his *refusal to register*, or his *intent to cancel* the registration, or *change the classification* of a pesticide" and "shall clearly and concisely set forth such objections . . . ." *Id.* § 164.22(a) (emphasis added). Nowhere in the Rules is an existing stocks determination referenced; instead the Rules repeatedly describe the contours of this proceeding in terms of three actions only: denials, cancellations, and changes to classification.

Reckitt argues that because Section 6(d) hearings are to be held on the "issues raised by the objections filed by the applicant" (7 U.S.C. § 136d(d)), and it raised the issue of existing stocks in its objections, the issue is properly before the ALJ in this cancellation proceeding. Mot. 3–4 (citing 37 Fed. Reg. 9,476, 9,477 (May 11, 1972) ("The issues to be considered in the hearing are defined by the order of cancellation or suspension or denial of registration and the objections thereto filed by the registrant or applicant.")). Reckitt also argues that the ALJ may order that the Agency's existing stocks "determination" is within the scope of the hearing, regardless of what EPA sets forth in the NOIC. Mot. 6. In support, Reckitt cites 40 C.F.R. § 22.4(c)(7) and 40 C.F.R. § 164.40(d), which state that the ALJ is authorized to "hear and decide questions of facts, law, or discretion" and "take actions and decisions in conformity with the statute or in the interests of justice." *Id*.

Review of the ample case law, however, makes it clear that the powers of the ALJ set forth in Rule 164.40(d) and the rules at Part 22 (which technically do not govern these proceedings), cannot trump the carefully assigned authority in FIFRA, which provides the

Administrator with the power to establish in the NOIC the scope of the cancellation proceeding as pertains to the issue of existing stocks.

In the oft-cited case *Shell Oil*, the Acting Judicial Officer,[3] writing on behalf of the Administrator, reversed the lower ruling of the ALJ in that case in part finding that the "ruling fails to give sufficient weight to the role of the § 6(b)(1) Notice in setting the standard of relevance for the conduct of the proceeding." 1 E.A.D. at 521. Also, the ALJ's decision permitted the parties, "by their own objections, to set the standard of relevance for the conduct of the proceeding," which is at odds with the statute. *Id.* at 524. The ALJ's decision was "premised on the conclusion that the Administrator is not bound by what was proposed in the notice in terms of the scope of relief that can be granted at the conclusion of the hearing." *Id*. at 522.

The Judicial Officer held that the notice of intent to cancel provides a "framework for the remainder of the proceeding," and sets forth the standard of relevance that shall govern the proceeding. *Id*. at 523–24 (citations omitted). Matters outside the scope of the NOIC are irrelevant. *Id*. at 524. Even though Section 6(d) does not expressly provide that the parties' objections must be relevant to the matters raised in the notice, "such a limitation on the right to file objections is necessarily implied." *Id*. The issues may be broadened from those set forth in the notice in some circumstances, e.g., by consent of the parties, or by the Administrator amending the notice, or if the Chief ALJ consolidates proceedings. *Id*. at 524 n.9. However the authority to issue the notice, and therefore set the standard of relevance, is left exclusively to the Administrator under Section 6(b). *Id*. at 524; *see also Notice of Hearing on the Applications to Use Sodium Fluoroacetate (Compound 1080) to Control Predators*, FIFRA Docket No. 502 (ALJ 1982) ("*Compound 1080*"), slip op. 47–48 (accessible at http://www.epa.gov/oalj/orders/fifra-502-id-102282.pdf), *aff'd in part* 1983 EPA App. LEXIS 17, 1 E.A.D. 792 (EAB 1983), *aff'd in part sub nom.* 773 F.2d 268 (10th Cir. 1985).[4] Plus, there are "sound policy reasons for

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[3] The Acting Judicial Office, Judge Ronald McCallum, was subsequently appointed as the Agency's "Chief Judicial Officer." Judge McCallum served alone in an appellate review capacity in regard to EPA's permit and administrative enforcement actions until March 1992, when the Environmental Appeals Board was created.

[4] In *Compound 1080*, the Administrative Law Judge held in the Initial Decision in pertinent part:

> Wyoming, et al. have contended that the evidence is sufficient to register the bait delivery unit (BDU) . . . as a means of predator control. It is well settled, however, that the issues in a suspension or cancellation proceeding may not be expanded to include uses or restrictions not proposed in the notice issued by the Administrator. [citation to *Shell Oil* omitted] The rationale for this decision is that under the statute only the Administrator or his delegate can issue a notice of intent to cancel or suspend and that such a notice necessarily sets the standard of relevance for the conduct of the hearing. The instant hearing is being conducted under Section 6 of the Act and the same reasoning is applicable. Accordingly, the ALJ has no authority to direct that the BDU be registered as a means of predator control.

not allowing the parties' objections to usurp the Administrator's discretion" to determine scope, e.g., over time, revisions to FIFRA have increased the Agency's discretionary authority to tailor cancellation decisions that will simultaneously protect the environment and avoid being unnecessarily restrictive. *Id*. at 524–25.

A decade after the ruling in *Shell Oil*, the U.S. Court of Appeals for the Ninth Circuit ruled in *Northwest Food* that the Administrator's construction of FIFRA's notice requirement in *Cedar Chemical* "is reasonable and controlling." 886 F.2d 1075, 1078. The Administrator had found in *Cedar Chemical* that the existing stocks issue can only be included in a FIFRA cancellation hearing when "the notice calling the hearing voluntarily identifies and includes existing stocks as an issue for examination." *Id*. (citing 2 E.A.D. at 588 n.9). Such holding stands today, and is directly applicable to the facts of this case.

In *Cedar Chemical*, the Administrator also found that FIFRA does not confer hearing rights on persons who do not agree with the Administrator's existing stocks determination. 2 E.A.D. at 588 n.7. Notably, the Administrator held:

> Hearing rights in a cancellation proceeding are conferred by FIFRA §§ 6(b) and (d), whereas existing stocks determinations are made under FIFRA § 6(a)(1), which vests broad discretion in the Administrator, as the [6(a)(1)] language demonstrates . . . .

Id. Section 6(a)(1) read differently at the time than it reads today, but not in such a way that alters the applicability of this particular holding to the present matter.[5]

Compound 1080, slip op. at 47-48 accessible at http://www.epa.gov/oalj/orders/fifra-502-id-102282.pdf.

[5] Section 6(a)(1) at the time read –

> [T]he Administrator may permit the continued sale and use of existing stocks of a pesticide whose registration is cancelled under this subsection or subsection (b) of this section to such extent, under such conditions, and for such uses as he may specify if he determines that such sale or use is not inconsistent with the purposes of this subchapter and will not have unreasonable adverse effects on the environment.

7 U.S.C. § 136d(a)(1) (effective Jan. 14, 1983). It currently reads –

> The Administrator may permit the continued sale and use of existing stocks of a pesticide whose registration is suspended or canceled under this section, or section 136a or 136a-1 of this title, to such extent, under such conditions, and for such uses as the Administrator determines that such sale or use is not inconsistent with the purposes of this subchapter.

7 U.S.C. § 136d(a)(1) (current).

The Administrator wrote that there is nothing in the hearing provisions at 6(b) and (d) "to suggest that further hearings are contemplated once the basic cancellation or classification decision takes place." *Id*. The "independence" of the existing stocks provision from the hearing provisions is "further highlighted" by Section 15(b)(2), which, at the time, authorized the Administrator, "[n]otwithstanding any other provision of this subchapter," to direct how pesticides that were cancelled because of posing an imminent hazard could be used or disposed. 7 U.S.C. § 136m(b)(2) (effective Jan. 14, 1983) (current version at 7 U.S.C. § 136d(b)(2)). As pointed out above, the substance of a similar, and in fact, broader authority (because it does not matter for what reason the pesticide is cancelled) is today set forth at Section 19 (Storage, disposal, transportation, and recall). 7 U.S.C. § 136q.

Acknowledging the holding in *Shell Oil* that the NOIC frames the issues for hearing, the Administrator in *Cedar Chemical* states that there are times when "existing stocks can be included in a FIFRA cancellation hearing," however, those "circumstances are limited to situations in which the notice calling the hearing voluntarily identifies and includes existing stocks as an issue for examination."[6] 2 E.A.D. at 588 n.9. The Administrator even noted that "existing stocks determinations are routinely made 'in house' without a formal hearing record." *Id*. at 588 n.11. Nor does "[t]he Administrative Procedure Act . . . create any separate hearing rights, since hearings respecting the formulation of orders, such as existing stocks orders, are not required unless the statute under which the order is formulated requires a hearing." *Id*. at 589 n.11 (citing *Vermont Yankee Nuclear Power v. NRDC,* 435 U.S. 519 (1978)).

Further support of the Agency's position can be found in an opinion of the Court of Appeals for the D.C. Circuit in *Environmental Defense Fund, Inc. v. Costle*, 631 F.2d 922 (1980), *cert. denied* 449 U.S. 1112 ("*EDF*"). The Court held that there is no automatic right to a hearing on the particular terms of a conditional cancellation under Section 6(b), if the cancellation determination itself is not challenged. In the NOIC issued in the case, the Agency sought to cancel registrations for non-citrus uses of a pesticide and conditionally cancel registrations for citrus uses of the pesticide. 44 Fed. Reg. 9548 (Feb. 13, 1979). No registrant requested a hearing, and the ALJ issued an Accelerated Decision dismissing the objections of Environmental Defense Fund ("EDF") and another entity. *Environmental Defense Fund, et al.*, FIFRA Docket Nos. 411, et al., slip op. (ALJ Aug. 20, 1979). On appeal to the Administrator, EDF objected to the Accelerated Decision, arguing that it should have been granted a hearing because it was adversely affected by the conditional cancellation, i.e., the retention of registrations for specific citrus uses. *Environmental Defense Fund, et al.*, 1 E.A.D. 543, 544 (EAB 1979). The Administrator held that FIFRA does not grant a hearing right when EDF's grievance "is not with the action proposed" in the NOIC (cancellation), "but with the action not proposed" (did not go far enough; did not cancel enough uses). 1 E.A.D. at 557. On appeal, the D.C. Circuit held: "[T]he language and structure of section 6(b) indicate that an adversely affected person may request a hearing to consider reasons why registration should not be

[6] An example of where the Agency specifically incorporates the existing stocks issue as an issue for hearing can be found in an NOIC issued in 1984 regarding uses of creosote, pentachlorophenol, and inorganic arsenicals: "To contest the regulatory actions (including the provisions governing existing stocks) set forth by this Notice, registrants . . . may request a hearing . . . ." 49 Fed. Reg. 28,666, 28,688 (July 13, 1984).

cancelled. There is no indication that a party has a right to a hearing to consider solely objections to the retention part of the notice." 631 F.2d at 936.

In the present matter, the relief Reckitt seeks in its Motion is akin to EDF's request. Like the conditions of cancellation in *EDF*, the fate of existing stocks is an issue independent of the heart of the matter – whether the registrations should be cancelled, and whether the applications should be denied – in a Section 6(b) hearing. This ruling is therefore consistent with precedent.

C. *EBDC* Holding Inapplicable to Case at Bar

Arguing that EPA lacks the authority to exclude the existing stocks question from the scope of the hearing, Reckitt cites the undersigned's Order Regarding Scope of Hearing in *EBDC*. Mot. 5-6. *EBDC* is distinguishable for several reasons. First, it was a different kind of proceeding than the present cancellation proceeding, in that it was brought as a petition for reconsideration of a cancellation determination already issued, pursuant to 40 C.F.R. Part 164, Subpart D.

Second, in the Notice of Hearing issued by the Administrator's delegate in *EBDC*, which is akin to the NOIC in the present matter, the Agency explicitly stated that the applicant's due diligence *would be* an issue for the hearing. 72 Fed. Reg. 37,771, 37,778 (July 11, 2007). In the present matter, the Agency explicitly stated the opposite. In refusing to delete the due diligence issue from the Prehearing Order in *EBDC* since the Notice of Hearing was amended to delete it, the undersigned noted that one of the parties, upon seeing the issue set forth in the original Notice of Hearing, had raised it in its hearing request, "thereby raising the issue in th[e] proceeding." *EBDC* at 10. In the present matter, there was never such an opportunity for Reckitt to be misled or mistaken about the exclusion of the existing stocks issue from the cancellation proceeding.

Third, as Rule 164.131(a) and the preamble to the Subpart D Rules make clear, the Agency in the EBDC case was actually required to make a finding about the applicant's due diligence *before* deciding whether a formal administrative hearing was even necessary. 40 C.F.R. § 164.131(a); *EBDC* at 9; 40 Fed. Reg. 12,261, 12,264 (Mar. 18, 1975). In this proceeding, by virtue of the language in Section 6(a)(1), the Administrator can only make a determination as to existing stocks *after* the cancellation proceeding, and then, only if the products are cancelled. 7 U.S.C. § 136d(a)(1). Thus, the scope question in *EBDC* was fundamentally different from the one at issue here, in that a determination on the applicant's due diligence was, by regulation, a legal prerequisite that had to be fulfilled before a hearing was scheduled in that Subpart D proceeding. In a cancellation proceeding such as this however, the question of existing stocks is only an issue for the hearing if the Administrator so elects, and the question of what to do with existing stocks does not even arise until after a cancellation proceeding has become final.

As to the question presented in *EBDC* of whether, through issuing an amended Notice of Hearing, "EPA trial staff [has] authority to eliminate issues from the hearing that are otherwise properly within the scope of the hearing," the undersigned ruled in that matter that EPA did not have that authority. *EBDC* at 12. The key difference between this point in *EBDC* and the

present exclusion of the issue of existing stocks is that here, an existing stocks determination is not "otherwise properly within the scope of the hearing." *Id*. The part of this ruling in *EBDC* upon which Reckitt and the other parties rely so heavily for their arguments reads as follows:

> NRDC's point is well taken that the regulatory requirement of the Administrator "to *specify* . . . the issues of fact and law to be adjudicated at the hearing," [Subpart D Rule citation omitted], does not empower the Administrator to exempt adjudication of issues through the Notice of Hearing procedure *that are to be adjudicated under applicable law and regulations*.

EBDC at 13 (second emphasis added). In contrast, in this matter, there is no independent administrative hearing right to the Agency's notice of its intentions regarding the disposition of existing stocks in applicable law or regulation, nor was any such right granted and then retracted, or implied at all during any point in this proceeding.

The ruling in *EBDC* also makes distinctions between *Shell Oil* and *Compound 1080*. In *Shell Oil*, "the party sought relief different than that sought in the NOIC," and in *Compound 1080*, a party sought "an additional type of relief to that sought in the complaint;" both were denied. *EBDC* at 14. In *EBDC*, "NRDC does not seek alternative relief . . . but rather, opposes the relief sought by the Task Force and supported by EPA." *Id*. Therefore, the Administrator could not exempt the issue from adjudication. *EBDC* at 13.

D. <u>Remaining Contentions</u>

Reckitt argues that it is entitled to a hearing on the EPA's existing stocks determination because it will be "adversely affected" by such determination, and the Rules state that a proceeding shall be commenced "whenever a hearing is requested by a person adversely affected by" a NOIC. Mot. 4; 40 C.F.R. § 164.20(a). FIFRA does not grant hearing rights to persons who at some point in the future, might be, if the products are ultimately cancelled, adversely affected by that future action. If that were the case, then a petitioner could include a challenge in its objections to any potentially adverse action the Administrator could be authorized to take, and thereby, include that issue in the cancellation proceeding, e.g., requirements that had not been established yet for storage of the containers of pesticides that could theoretically be too burdensome, in case the products were cancelled, pursuant to the Administrator's authority under Section 19. 7 U.S.C. § 136q(a)(2).

As the case law shows, without the Agency's deliberate inclusion of the existing stocks issue in the hearing, FIFRA does not provide for administrative review of Section 6(a)(1) determinations. Instead, parties have access to judicial review once a determination as to existing stocks of a cancelled product becomes final agency action, as Sections 6(h) and 16 explicitly make clear. 7 U.S.C. § 136d(h) ("Final orders of the Administrator under this section shall be subject to judicial review pursuant to section 136n of this title."); 7 U.S.C. § 136n(b) ("In the case of actual controversy as to the validity of any order issued by the Administrator following a public hearing, any person who will be adversely affected by such order and who had been a party to the proceedings may obtain judicial review by filing in the United States court of appeals for the circuit wherein such person resides or has a place of business . . . .").

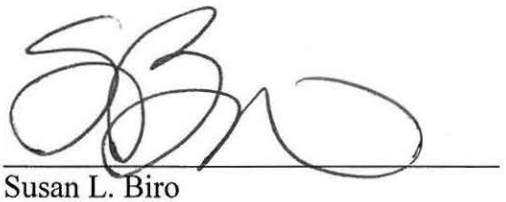
Despite their repeated entreaties to the contrary, Petitioners are not unduly prejudiced or being punished by the Agency notifying them now of its intention to ban existing stocks depending on the outcome of the cancellation case. EPA could have, alternatively, been completely silent on the subject until this Tribunal issued a decision, leaving Reckitt, the other Petitioners, and any other interested parties wondering about the fate of existing stocks throughout the hearing process to a greater extent than they are now. Yet another outcome could have been that EPA remained silent on this issue in the NOIC, and if Petitioners had not requested a hearing, the cancellation would have become effective by operation of law, leaving very little time for retailers to prepare for an automatic ban on the sale of those cancelled products. Far from "an attempt to intimidate retailers who may lawfully continue to stock the Subject Products pending the outcome of a hearing" (Mot. 3), the Agency argues that it was serving notice on interested parties for purposes of preparation and good public policy (EPA Resp. 10-11). EPA's view is more credible.

Finally, the Agency's comment that the letter from an EPA official to Senator Bellmon is "unremarkable" is correct. EPA Opp. 2-3; CLA Brief 5. Section 6(b) hearings explicitly include a risk-benefit analysis. EPA Opp. 2-3. The risk and benefits of continued registration are relevant to the question of whether the pesticide should be cancelled, not the risks and benefits "associated with whatever post-cancellation use that might subsequently be allowed." *Id.*

All other arguments in the documents submitted in response to, or in support of, Reckitt's Motion that have not been explicitly addressed herein were also considered and found to be without merit.

For the reasons set forth above, Petitioner Reckitt's Motion for an Expedited Determination that EPA's Existing Stocks Decision is Within the Scope of the Hearing is **DENIED**.

SO ORDERED.



Susan L. Biro
Chief Administrative Law Judge

Dated: February 3, 2014
Washington, D.C.

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

CERTIFICATE OF SERVICE

I hereby certify that a letter offering **Order On Motion For An Expedited Determination That EPA's Existing Stocks Decision Is Within The Scope Of The Hearing**, dated February 3, 2014, was sent this day in following manner to the addresses listed below:

Sybil Anderson
Office of Administrative Law Judges
U.S. Environmental Protection Agency
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Dated: **February 3, 2014**

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