UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of: | ) | |
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| Reckitt Benckiser LLC, et al. | ) | FIFRA Docket No. 661 |
| | ) | |
| EPA Reg. Nos. 3282-3, 3282-4, 3282-9, 3282-15, 3282-65, 3282-66, 3282-74, 3282-81, 3282-85, 3282-86, 3282-87, and 3282-88 | ) | |

**RESPONDENT'S RESPONSE TO MOTION REGARDING WHETHER DISPOSITION OF EXISTING STOCKS OF CANCELLED PRODUCTS IS WITHIN THE SCOPE OF THE PROCEEDING**

On April 12, 2013, Reckitt Benckiser LLC ("Reckitt") filed a Motion for an Expedited Determination That EPA's Existing Stocks Decision Is Within The Scope of The Hearing ("Motion"). The February 5, 2013 Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products ("NOIC"), issued by the Assistant Administrator for Chemical Safety and Pollution Prevention ("Respondent") pursuant to duly delegated authority,[1] is absolutely clear in regard to existing stocks of cancelled products:

> In the case of this rodenticide cancellation Notice, EPA has determined not to include existing stocks as an issue in this hearing. Instead, the only issues for hearing under this Notice are whether the subject products should be cancelled, or the applications should be denied.

78 Fed.Reg. 8123, 8126 (2013).

[1] EPA Delegation Number 5-7 (May 11, 1994).

Respondent decided not to include this issue within the scope of the cancellation proceeding primarily because the disposition of existing stocks is not relevant to the question of whether the d-CON products identified in the NOIC meet the criteria for registration under FIFRA, because the continued sale and distribution of these products after cancellation would continue to cause unreasonable adverse effects on health and the environment, and because Reckitt has been on notice since at least 2008 – and arguably 1998 -- that these products do not meet the criteria for registration under FIFRA.

The arguments in Reckitt's Motion appear to consist of three legal contentions: (1) A registrant has a right to a formal administrative adjudication regarding the disposition of existing stocks of a cancelled pesticide, irrespective of the contents of the NOIC; (2) Even if no such right exists, Respondent has brought the disposition of existing stocks of cancelled products within the potential scope of this proceeding by identifying the issue in the NOIC; and (3) Even if the other arguments are unavailing, the Administrative Law Judge ("ALJ") has inherent authority to expand the scope of the proceeding to include the disposition of existing stocks of cancelled product, and should do so. For reasons discussed below, each of these contentions is without merit and Reckitt's Motion should be denied.

## I. The Administrator Has Already Determined that FIFRA Affords No Right To A Hearing On The Disposition Of Existing Stocks of Cancelled Products[2]

The ruling of then-Administrator Lee Thomas in *In the Matter of Cedar Chemical Co., et al.*, 2 E.A.D. 584, 1988 WL 525242 (June 9, 1988), held that FIFRA does not create any right to hearing on the disposition of existing stocks of cancelled product:

[2] Although the argumentation that comprises the "Introduction" to Reckitt's Motion includes numerous errors and exaggerations, it is entirely irrelevant to the merits of the motion, and therefore merits no response.

> 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, as the following language demonstrates:
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> > [T]he Administrator may permit the continued sale and use of existing stocks of a pesticide whose registration is cancelled under [ FIFRA § 6( b) ] *** to such extent, under such conditions, and for such uses as he may specify ***.
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> Existing stocks are not mentioned in the FIFRA hearing provisions, which delineate the scope of hearings on whether a product registration should be cancelled or the classification changed. FIFRA § 6( b) ("[T]he Administrator may issue a notice of his intent *** to cancel a [pesticide's] *** registration or to change its registration ***. In the event a hearing is held ***, a decision pertaining to registration or classification issued after completion of such hearing shall be final."); FIFRA § 6(d) ("As soon as practicable after completion of the hearing ***, the Administrator shall *** issue an order either cancelling the registration, changing the classification, denying the registration, or requiring modification of the labeling or packaging of the article."). There is nothing in these hearing provisions to suggest that further hearings are contemplated once the basic cancellation or classification decision takes place. This independence of the existing stocks determination from the hearing requirements is further highlighted by FIFRA § 15(b)(2), which authorizes the Administrator to allow use of existing stocks "[n]otwithstanding any other provision of this sub-chapter" in those instances where registrations have been cancelled because of an "imminent hazard."

*In the Matter of Cedar Chemical Co., et al.*, 2 E.A.D. 584, 587-88 n.7, 1988 WL 525242 (June 9, 1988).

The Administrator addressed this issue further in a subsequent footnote in the *Cedar Chemical* decision, noting that while the Administrator may, at his discretion, let existing stocks become an issue in a cancellation proceeding, he had not done so in that case:

> Nevertheless, there are circumstances ... when existing stocks can be included in a FIFRA cancellation hearing. ... The circumstances are limited to situations in which the notice calling the hearing voluntarily identifies and includes existing stocks as an issue for examination. Id. This conclusion is consistent with the Agency's decision in Shell Oil Company, et al., FIFRA Docket No. 401, April 9, 1979 (Order on Interlocutory Appeal), which held that the Administrator's cancellation notice establishes a "framework" for the proceeding:
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> > In procedural terms the notice serves much the same function as a complaint in any other administrative proceeding, and as such, it "set[s] a standard of relevance which shall govern the proceedings at the hearing." [Citation omitted.] Thus, matters falling outside the scope of the notice *** are of no relevance to the proceeding. [[*Shell Oil slip op.*] at pp. 10-11.]
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> Obviously, if an issue is identified in the cancellation notice, it fits within the framework of the proceeding and may be litigated in a hearing. *In the present instance, the notice*

*calling the hearing did not identify existing stocks as being among the issues for resolution at the hearing.*

*Cedar Chemical* at 588, n.9 (emphasis added).

The Administrator has determined that FIFRA does not create any right to hearing on the disposition of existing stocks of cancelled products, and that existing stocks of cancelled products can be at issue in a proceeding only if the notice of intent to cancel shows that the Assistant Administrator has identified and voluntarily included existing stocks among the issues for resolution at the hearing.[3] The Administrator reached this interpretation in his holding in a formal adjudication and has never changed that interpretation. Thus, this holding remains binding on the Administrator's subordinates and delegatees, including this tribunal.

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[3] Unable to satisfy the plain terms of the *Cedar Chemicals* test (i.e., whether the "notice calling the hearing voluntarily identifies and includes existing stocks," *Cedar Chemical* at 588, n.9), Reckitt urges this court to adopt a different test that it would be able to satisfy (*i.e.*, whether the person requesting a hearing on existing stocks is an intervener and whether the notice mentions existing stocks in any respect). See Motion at 9-11. But the test Reckitt would prefer is simply not the test *Cedar Chemicals* provides. Reckitt deliberately conflates two separate holdings to create the appearance of supportive authority, *Cedar Chemicals* certainly holds that because a registrant cannot be compelled to produce a product against its will, non-registrants who would support a pesticide have no right to a hearing without the registrant's consent. However, the Administrator clearly stated that that issue was wholly distinct from the question of whether anyone has a right to a hearing regarding existing stocks: "Cedar's and Drexel's proprietary rights over the fate of their own stocks (for example, over quantities, uses, and label specifications) *is not dispositive* of AFFI's interests in the fate of non-Cedar and non-Drexel existing stocks..." *Cedar Chemicals* at 587 (emphasis added). Having disposed of that issue, the Administrator next proceeded to address whether there exists a right to hearing on existing stocks issues:

> Respondent contends, and I agree, that FIFRA does not confer hearing rights *on persons* who disagree with an existing stocks determination. EPA routinely makes provisions [regarding] sale and use of existing stocks in the absence of a hearing. Therefore, even though the settlement [and consequently, lack of a registrant's consent] by itself does not disqualify AFFI from demanding a hearing on the existing stocks proposal ..., the absence of *any* hearing rights under FIFRA ultimately has the same legal effect.

*Id.* at 587-88 (emphases added, footnotes omitted).

*Cedar Chemicals* held that there is no right to a hearing on existing stocks issues, and the quoted text shows that the Administrator reached that holding in the explicit context of whether "persons" have "any" such right. This confirms the broad applicability of the holding that "FIFRA does not confer hearing rights *on persons who disagree* with an existing stocks determination" (*id.* (emphasis added)) and "FIFRA does not confer any hearing rights *on opponents of* an existing stocks determination" (*id.* at n.7 (emphasis added)), rather than limiting it to non-registrants or interveners. This broad language, combined with the Administrator having clearly separated his consideration of the right to a hearing on existing stocks issues from his consideration of non-registrants' rights to contest cancellation compels, rejection of Reckitt's attempt to limit *Cedar Chemicals* to non-registrants. Even if there were some ambiguity in *Cedar Chemicals*, it cannot be construed as only applying to the rights of interveners. Inasmuch as § 164.31(c) provides that an intervener "shall ... become a party with the full status of the original parties", it is reasonable to expect that a decision that turned upon a party's status as an intervener would address that issue in significant detail. In the absence of any such discussion, the *Cedar Chemicals* holding that there is no right to a hearing on existing stocks issues is most reasonably read as applying to all parties equally.

Moreover, the Ninth Circuit has reviewed and specifically affirmed the Agency's *Cedar Chemical* interpretation in *Northwest Food Processors Ass'n v. Reilly*, 886 F. 2d 1075 (9th Cir. 1989) *cert. denied* 497 U.S. 1004, 110 S.Ct. 3239, 111 L.Ed.2d 750 (1990):

> In his final decision approving the settlement, the Administrator determined that, under FIFRA, the existing stocks issues were not legally a part of the cancellation hearing. *In re Cedar Chem. Co.*, FIFRA Nos. 590 et al., slip op. at 8 n.9 (June 9, 1988).[FN4] "[E]xisting stocks can be included in a FIFRA cancellation hearing" only when "the notice calling the hearing voluntarily identifies and includes existing stocks as an issue for examination." *Id.* In the present case, "the notice calling the hearing did not identify existing stocks as being among the issues for resolution at the hearing." *Id.*
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> We hold that this construction of FIFRA's notice requirement by the Administrator is reasonable and, therefore, controlling. See *Mesa Verde Constr. Co. v. Northern California Dist. Council of Laborers*, 861 F.2d 1124, 1135 (9th Cir.1988) (en banc) (discussing our deference to the construction of statutes by agencies).
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> [FN4.] Nonetheless, the Administrator decided that he could, as an exercise of his discretionary powers, consider the objections to the existing stocks provisions which were raised by [certain parties]. ...

*Northwest Food Processors Association* at 1078.

Because this issue has been considered and resolved by the Administrator, and was not overturned on appeal, the *Cedar Chemical* interpretation of the role of existing stocks in cancellation proceedings is settled law for purposes of this proceeding.[4] Thus, it is settled law for this proceeding that FIFRA does not create any right to hearing on the disposition of existing stocks of cancelled product, and that existing stocks of cancelled products can be at issue in a proceeding only if the notice of intent to cancel identifies existing stocks as being among the issues for resolution at the hearing.

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[4] "[O]nce the agency has ruled on a given matter, [moreover,] it is not open to reargument by the administrative law judge; ... although an administrative law judge on occasion may privately disagree with the agency's treatment of a given problem, it is not his proper function to express such disagreement in his published rulings or decisions." 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).

**II. The Possible Scope Of A Proceeding Is Circumscribed By The NOIC And Neither FIFRA Section 6(b) Nor 40 C.F.R. Part 164 Affords A Right to Object to Matters Outside That Scope**

Like most formal adjudications in the American legal system, a FIFRA cancellation proceeding arises from a pair of foundation pleadings filed by opposing parties. The Respondent's notice of intent to cancel and accompanying statement of reasons gives public notice of the proposed action and the reasons (including the factual basis) for the action. FIFRA sections 6(b)(1) and 6(f)(2); 40 CFR § 164.21(a). The request for hearing is a responsive pleading wherein a registrant or other adversely affected person may state objections to all or part of the proposed cancellation and the basis for each objection. FIFRA section 6(b); 40 CFR § 164.22. In the absence of a request for hearing, the proposed cancellations take effect by operation of law. FIFRA section 6(b). If a hearing is requested in regard to some, but not all, products or uses identified in a NOIC, the request for hearing narrows the scope of the proceeding relative to the full range possible under the NOIC, as all products and uses other than those specified in a request for hearing would be cancelled by operation of law.

EPA's Chief Judicial Officer explained the NOIC's function in establishing the scope of a cancellation proceeding in a 1979 decision:

> "In procedural terms the notice serves much the same function as a complaint in any other administrative proceeding, and as such, it 'set[s] a standard of relevance which shall govern the proceedings at the hearing.' Thus, matters falling outside the scope of the notice of intent to cancel are of no relevance to the proceeding."

*In the Matter of Shell Oil Company, et al.*, 1 E.A.D. 517, 523-24, 1979 WL 52074 (April 9, 1979)(footnotes omitted).

The Chief Judicial Officer 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 notice of intent to cancel: "Although the language of Section 6 does not expressly provide that the parties' objections must be relevant to the matters raised in the

notice of intent to cancel, such a limitation on the right to file objections is necessarily implied." *Id.* at 524.

At issue in *Shell Oil* was whether the objections a party filed in association with its request for hearing could expand the scope of the proceeding to include matters not contained in the notice of intent to cancel. The Chief Judicial Officer expressly rejected the contention that parties' objections could expand the scope of the proceeding as contrary to the statutory scheme because that authority is delegated solely to the Respondent:

> "The Administrative Law Judge's ruling, on the other hand, allows the parties, by their own objections, to set the standard of relevance for the conduct of the proceeding. This result is contrary to the statutory scheme. Under Section 6(b), the authority to issue a notice of intent to cancel, and hence, set the standard of relevance, is expressly reserved to the Administrator. The Administrator may, of course, delegate that authority to another Agency official, as he did in this case by designating the Assistant Administrator; however, there is no provision in the Act authorizing such notice to be issued by private parties."

*Id.* at 524.

This conclusion – that the objections filed in association with hearing requests cannot expand the scope of the proceeding – does not deny the important role of such objections in defining the scope of the hearing; it merely recognizes that their impact is confined within the outer bound established in the NOIC. FIFRA section 6(d) provides that the evidentiary 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..." Given the responsive nature of the request for hearing, it is not reasonable to interpret this provision as allowing a hearing requestor to expand the scope of the hearing. Instead, the most reasonable interpretation of this provision is that no hearing at all is appropriate for those products or uses identified in the NOIC that are not the subject of properly filed objections. Reckitt's interpretation of section 6(d) as allowing parties other than Respondent to expand the scope of the proceeding beyond that identified in the

NOIC would usurp the authority that, according to the Chief Judicial Officer in *Shell Oil*, lies with Respondent, as the Administrator's delegate.

Moreover, the section 6(d) requirement that evidence presented be "relevant and material" necessarily relates back to the essential purpose of the proceeding, which is, according to section 6(b), to determine whether "a pesticide or its labeling or other material required to be submitted does not comply with the provisions of this Act or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects on the environment, [such that] the Administrator [should] cancel its registration or change its classification..." Questions regarding what might be done with existing stocks of a pesticide after it has been cancelled are simply not pertinent to the question of whether the pesticide complies with the FIFRA registration requirements or, when used in accordance with widespread and commonly recognized practice, generally causes unreasonable adverse effects. Nothing in sections 6(b) or 6(d) suggests that existing stocks of cancelled pesticides are relevant to a cancellation proceeding. Instead, the Administrator's authority over existing stocks comes from a completely different provision, section 6(a). The structure of section 6 compels a conclusion that the section 6(a) authority over existing stocks is – like the subjects of sections 6(c), 6(e), 6(f) and 6(g) – wholly irrelevant to, and outside the scope of, a hearing under sections 6(b) and 6(d).

In this context, it is clear that the function of the § 164.22 requirement for specific objections is not to invite expansion of the issues in the proceeding but rather to clarify whether it is necessary in the proceeding to consider and resolve the full scope of issues specified in the NOIC. Depending on the interests of the potential parties, the ultimate scope of the proceeding may be significantly narrowed in the event that properly filed objections are limited to a narrower set of issues.

Reckitt's contention that the NOIC is no more than an advocate's position and not entitled to deference ignores the jurisdictional function of the NOIC. Motion at 6-7. Reckitt bases its contention on the EBDC opinion, where the ALJ found that the notice of hearing "is merely an announcement of an event and related information and has no binding legal effect." EBDC opinion at 13. Respondent agrees that the NOIC does not in itself have the same "binding legal effect" as a regulation or order; 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.[5] For example, failure to properly request a hearing leads to automatic cancellation, and the failure to raise certain objections forecloses future opportunities for hearing on such objections.[6] Without quibbling over "binding legal effect," there is no question that the filing of the NOIC has real legal consequences, and the consequences of filing one particular NOIC will necessarily differ from the consequences of filing another, slightly different NOIC. Among the consequences of filing an NOIC is that the terms of that particular NOIC establish the outer boundaries of the possible scope of any ensuing cancellation, and the possible scope of any ensuing cancellation proceeding. Thus the NOIC has a jurisdictional effect that is binding on the parties and the ALJ. To the extent that the NOIC is unclear, the ALJ must necessarily interpret the NOIC to determine its scope. However, neither the ALJ nor any party (other than Respondent, by amending the NOIC) has the authority to expand the scope of the cancellation or

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[5] Moreover, because the EBDC order addressed only a subpart D notice of hearing, which has different functions and consequences than the subpart B NOIC at issue here, it is not controlling precedent in this proceeding. *See infra* at 13-15.

[6] Likewise, as Reckitt has admitted, a request for hearing also has concrete legal effects: "The effect of a request for hearing is effectively to 'stay' implementation of EPA's cancellation ... action, pending the final determination from the hearing process." Reckitt's Verified Complaint For Declaratory And Injunctive Relief at 14, *Reckitt Benckiser v. Jackson*, 666 F. Supp. 2d 131 (D.D.C. 2009).

cancellation proceeding beyond the scope specified in the NOIC, because that would usurp the authority duly delegated to Respondent to determine the scope of the NOIC.[7]

The ALJ has the responsibility of conducting the proceeding that arises from the conjunction of the Respondent's filing of the NOIC and the Petitioners' filing of requests for hearing. If either a NOIC or a request for hearing is lacking, there is no proceeding for an ALJ to conduct.[8] The ALJ's jurisdiction therefore is limited to the scope of the proceeding, which is the intersection of the issues presented in the NOIC and the objections presented in the request(s) for hearing.

In determining the scope of the proceeding, the ALJ must necessarily delineate the respective scopes of the issues presented in the NOIC and the objections presented in the request(s) for hearing. Where either the NOIC or the request(s) for hearing – or their interrelation – is unclear, the ALJ has the responsibility of interpreting them.

However, the ALJ's role in determining the scope of the proceeding is fundamentally adjudicative: The ALJ is obliged to respect the texts she interprets and is prohibited from substituting her own judgment for that of the institutional authors.[9] If it were the case that the

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[7] Reckitt's characterization of the NOIC as "merely an advocate's position in litigation [and] not entitled to deference" also improperly denies the institutional expertise and authority of the Assistant Administrator for Chemical Safety and Pollution Prevention. To the extent that decisions of the Agency are entitled to a measure of deference owing to its institutional expertise regarding the regulation of pesticides pursuant to FIFRA, that institutional agency expertise resides in Respondent. Although Respondent is indeed a contesting party in this proceeding, its positions must be given some measure of deference, as there is within the Agency no comparable source of institutional agency expertise regarding the regulation of pesticides.

[8] *See, e.g., Cedar Chemicals* at 585 ("Currently, all registrants except Cedar and Drexel have either failed to request a hearing (to contest cancellation of their dinoseb registrations) or they have withdrawn their requests after having initially made them. ... Because these registrations have been cancelled already, further consideration of the registrability of the products they cover is beyond the scope of this proceeding, for the only remaining registrations at issue are those belonging to Cedar and Drexel.")

[9] Reckitt's Motion turns the principle of separation of functions on its head, arguing that the ALJ must disregard the Administrator's policy decision in *Cedar Chemical* and the Agency's delegations manual in order to avoid an unlawful combination of functions. Motion at 7. Contrary to Reckitt's allegations, there are no exceptional constraints on the ALJ's independence within the scope of the proceeding the ALJ is charged with conducting. *Id.*

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. However, the NOIC in this proceeding is neither silent nor ambiguous, nor amenable to interpretation as putting the disposition of existing stocks at issue. Reckitt's Motion unabashedly asks the ALJ to disregard the express, unmistakable intent of the Respondent as to a policy decision duly delegated to the Respondent, and instead adopt a different policy choice. Reckitt's Motion must therefore be denied. [10]

## III. Reckitt's Other Arguments For Including Existing Stocks of Cancelled Products Within The Scope Of This Proceeding Are Without Merit

Reckitt contends that Respondent has placed the disposition of existing stocks of any cancelled products at issue in the proceeding simply by indicating in the Notice that the disposition of existing stocks is *not* a matter within the scope of the Notice and Respondent's intentions regarding the existing stocks of d-CON products cancelled pursuant to the proceeding. Motion at 3-4, 6. As discussed above, Respondent has the authority to define the scope of the proceeding in the NOIC. Depending on the drafting of the NOIC, the boundaries of a proceeding's scope might be expressed with greater or lesser clarity. Respondent maintains that the public interest is best served by describing the boundaries of a proceeding's scope, and

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In addition, although it is not pertinent to the question at issue, it must be noted that Reckitt errs in its assertion that "the EPA Administrator is exempt from the general separation of functions requirements". Motion at 7. Owing to the possibility that all or part of this proceeding might be referred to the Administrator for adjudication, EPA is maintaining a separation of functions that extends into the immediate office of the Administrator in order to avoid the potential for *ex parte* communications regarding the merits of this proceeding with any potential adjudicator. *See* 40 C.F.R. § 164.7.

[10] Reckitt's difficulty in appreciating the significance of scope limitations is also evident in pages 6 and 7 of its Motion, where it cites 40 CFR § 22.4 regarding the authority of the ALJ, as if it were applicable to this proceeding. This proceeding does not fall within the scope of the Consolidated Rules of Practice, 40 C.F.R. part 22. *See* § 22.1. Although provisions of the Consolidated Rules of Practice might be useful models for circumstances where the part 164 rules are silent and the ALJ must make procedural rulings, they are no more applicable here than the procedural rules of any other tribunal.

Respondent's intentions regarding the existing stocks of those products cancelled pursuant to the proceeding, as clearly and unambiguously as practicable. Respondent has done so in this proceeding, and it has done so in as unambiguous a way as can be conceived. The fact that an NOIC includes within its four corners a scope discussion that explicitly identifies specific issues as being outside the scope of a proceeding does not bring those issues within the scope of issues to be resolved in the proceeding, any more that a judge's consideration of scope issues by itself expands the proper scope of a proceeding. A contrary view would produce the perverse result of encouraging Respondent to say as little as possible about an NOIC's scope in the NOIC itself. Neither should Respondent's decision to announce in advance its intentions regarding existing stocks of cancelled products (in the event that it prevails in the cancellation hearing) be construed as "voluntarily ... includ[ing] existing stocks as an issue for examination" in the cancellation hearing itself. The notion that a government agency should best accomplish its intent by declining to inform affected persons is at odds with nearly every principle of administrative law and cannot be seriously entertained. An uncontested NOIC becomes final in 30 days, and the products identified in an uncontested NOIC are automatically cancelled on the 30th day, so if Respondent had said nothing in the NOIC about its intent in regard to existing stocks of cancelled products it would have left potentially affected persons unable to prepare for that outcome. If an express statement in the NOIC that existing stocks are outside the scope of the proceeding, or a statement in the NOIC regarding Respondent's intentions regarding existing stocks, were sufficient to bring the disposition of existing stocks within the scope of issues to be resolved in the proceeding, then EPA would be forced to communicate such matters to the public through other, less effective channels.

It is unclear whether Reckitt's argument regarding § 164.20(a) is intended to use that provision as evidence that EPA has recognized in FIFRA a right of adversely affected persons to expand the scope of a cancellation proceeding, or whether Reckitt argues § 164.20(a) independently creates such a right. Motion at 4-5. In either case, the argument is unfounded. First, the quoted authority ("'A proceeding shall be commenced whenever a hearing is requested by any person adversely affected by' a NOIC. 40 C.F.R. § 164.20(a)." Motion at 4) merely establishes the procedural circumstances necessary for the commencement of a proceeding subject to part 164, subpart B. It implies nothing about the scope of issues that might be raised in a hearing request, and cannot reasonably be construed as granting adversely affected persons any right to a hearing independent of, or broader than, the right provided by section 6(b) of FIFRA. Although Reckitt may find unwelcome consequences of its refusal to include common-sense safety measures in its affected d-CON products and from its decision to contest cancellation, Reckitt is not necessarily entitled to be insulated from those consequences.[11]

Reckitt's reliance on *In the Matter of Request To Reduce Pre-Harvest Interval For EBDC Fungicides On Potatoes*, Docket No. EPA-HQ-OPP-2007-0181 (Order Regarding Scope of Hearing, January 16, 2008), is misplaced. Motion at 5-6. First, the EBDC proceeding was subject to statutory and regulatory provisions fundamentally different from the instant action, as it concerned a determination by the Assistant Administrator to reconsider a final cancellation

[11] Reckitt's Motion overstates the adverse effects of a prohibition on sale and distribution of existing stocks of cancelled product, and fails to offer any evidence that such effects even exist. Motion at 4-5. If Reckitt's customers are deterred from purchasing its products *on account of Respondent's intention to prohibit sale and distribution of existing stocks of cancelled product*, as opposed to concerns about the health and environmental risks associated with those products, Reckitt could easily eliminate that deterrence by agreeing to buy back cancelled product or underwrite its customers' disposal costs. If Reckitt is correct in its contention that the d-Con products subject to this proceeding meet the FIFRA registration criteria, such a commitment would cost it nothing. However, if Respondent is correct that the d-Con products subject to this proceeding pose unreasonable risks to health and the environment and should not be sold – as Respondent has consistently maintained since at least 2008 (and, arguably, since 1998) – the financial costs of Reckitt's final efforts to move more of these products onto the market represent a business choice that cannot give rise to any right to a hearing.

order, and was governed by subpart D of 40 CFR part 164, rather than subpart B. A subpart D proceeding is a FIFRA section 3 registration action, not a cancellation proceeding subject to FIFRA sections 6(b) or 6(d). Although EPA has determined that registering new uses of a cancelled product merits a formal public hearing process, and has provided that process in subpart D of part 164, such a proceeding is not subject to FIFRA sections 6(b) or 6(d). Accordingly, interpretations of the scope of a section 3 registration action in a subpart D proceeding are inapposite to a section 6(b) cancellation proceeding.

Second, the findings in the EBDC order regarding whether due diligence was properly within the scope of that proceeding were based on interpretation of language in subpart D that has no counterpart in subpart B that could reasonably support Reckitt's position. At issue in the EBDC opinion was whether the notice of hearing could exclude from the scope of the proceeding the question of whether certain "new" evidence could have been discovered through exercise of due diligence during the earlier proceeding. In a subpart D proceeding, § 164.132(a) expressly provides that the question of "whether substantial new evidence exists" shall be at issue in the hearing. Although Respondent maintained that subpart D assigns the question of "due diligence" solely to Respondent (as delegatee of the Administrator in regard to issuance of a hearing notice) under § 164.131(a) and not to the ALJ under § 164.132, the ALJ did not find that distinction compelled by part 164, and held that the question of due diligence could be relevant to the ALJ's determination of whether "substantial new evidence" exists. However, none of the subpart D provisions that informed this aspect of the EBDC opinion is in any way at issue in the instant subpart B proceeding. The language in subpart D that provided the basis for the EBDC order has no counterpart in subpart B. The interpretation of §§ 164.131 and 164.132

in the EBDC order simply has no bearing on the Assistant Administrator's authority to determine the scope of an NOIC issued pursuant to subpart B.

Even if the EBDC opinion had originated in a cancellation proceeding, its holding is largely unrelated the issues in the instant case. First, the EBDC opinion concerned whether a particular aspect ("due diligence") of a larger issue that was undisputedly within the scope of the proceeding ("new evidence") was reserved to the Respondent. This is a fundamentally different question from the instant question of whether an issue (disposition of existing stocks) that is irrelevant to the merits of a proceeding (whether products meet the FIFRA registration criteria) might be considered in the proceeding. Second, regarding the Respondent's authority to limit the scope of the proceeding, the holding of the EBDC opinion was expressly limited to whether the amendment of notice of hearing could "render immaterial the allegations set forth in" an earlier request for hearing, and says nothing regarding Respondent's discretionary authority to include within the scope of the proceeding issues additional to those necessary to deciding whether products meet the FIFRA registration criteria. Because the EBDC opinion concerned issues that are factually unrelated and analytically distinct from the issue raised by Reckitt's Motion, it is not analogous to the instant case and has no precedential value here.

Reckitt also errs in its claim that this Tribunal is the only check on Respondent's potential to abuse its discretion. Motion at 8. Valid allegations of abuse of discretion in regard to actions outside the scope of this proceeding may be brought before the federal courts by appropriate parties. This Tribunal must decline Reckitt's invitation to claim jurisdiction over matters beyond the scope of this proceeding and committed to the Assistant Administrator's discretion.

## IV. Respondent's Position is Consistent with Prior Agency Actions

Separate from the questions regarding the scope of a registrant's right to a hearing and Respondent's authority to determine the potential scope of a proceeding, Reckitt contends that Respondent has "abused its discretion with respect to the existing stocks determination..." Motion at 8.[12] Reckitt's allegation that Respondent's position on existing stocks is arbitrary or an abuse of discretion is unfounded and ignores EPA's most important responsibility under FIFRA, the responsibility to prevent unreasonable adverse effects on the environment (defined in section 2(bb) of FIFRA as, among other things, "any unreasonable risk to man or the environment", and where, per FIFRA section 2(j), "[t]he term 'environment' includes water, air, land, and all plants and man and other animals living therein, and the interrelationships which exist among these.").

First, Respondent's position regarding existing stocks is consistent with FIFRA. It is a violation of FIFRA section 12(a)(1)(A) to sell or distribute any pesticide that has been cancelled or suspended, except to the extent that sale or distribution is authorized by the Administrator. Thus, FIFRA 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. In contrast, the default position is that FIFRA allows *use* of such existing stocks, unless specifically prohibited by the Administrator. Respondent's position regarding existing stocks in this proceeding is identical to

[12] Reckitt's argument regarding abuse of discretion fails to distinguish between two fundamentally different issues: Respondent's decision not to include within the scope of the cancellation proceeding the disposition of existing stocks of cancelled products, and Respondent's announced intention not to allow sale or distribution of existing stocks after the conclusion of this proceeding. While Respondent maintains that both are committed to Respondent's discretion and not properly before this Tribunal, Respondent also notes that the latter is merely a statement of the Respondent's intent regarding an expected future circumstance, and cannot reasonably be considered reviewable as a final agency action. Nevertheless, because Reckitt's abuse of discretion argument conflates these distinct issues, Respondent addresses both, but without conceding that they are jurisdictionally equivalent.

the default positions established by Congress in FIFRA, and therefore clearly not an of abuse discretion.

Second, Respondent's position regarding existing stocks is consistent with EPA's longstanding position that sale and distribution of existing stocks of cancelled pesticides that pose risk concerns should not be allowed unless EPA determines that such sale or distribution would not cause unreasonable adverse effects on the environment. Existing Stocks of Pesticide Products; Statement of Policy, 56 Fed. Reg. 29362, 29364 (June 26, 1991). Disallowing sale and distribution of existing stocks of cancelled products is consistent with the Existing Stocks policy in this case, because the rationale for cancellation set forth in the NOIC is that the products at issue in this proceeding pose unnecessary and unreasonable risks to children, pets, and non-target wildlife.

Disallowing sale and distribution of existing stocks of cancelled products is also consistent with the Existing Stocks policy owing to the fact that the cancellation will be the consequence of a section 6(b) cancellation hearing:

> If a cancellation is the result of a final Agency action after ... a hearing pursuant to section 6(b), the Agency is *unlikely* to allow continued sale or distribution (and quite possibly, use) of the cancelled pesticide. In such circumstances, registrants, other distributors, and users of the pesticide have had ample notice of the Agency's intentions and sufficient time to take appropriate steps accordingly (such as to procure alternatives, not stockpile large quantities of the pesticide involved, use up stocks already on hand, etc.). On the other hand, where a voluntary cancellation occurs well before the Agency could take final action (i.e., prior to the completion of a special review or in lieu of a hearing under section 6(b)), the Agency may take into consideration the shorter period of notice sellers and users may have had before cancellation, the degree to which the registrant's actions accelerated the removal of the pesticide from the market, and whether the cancellation would have occurred at all without an existing stocks provision.

*Id.* at 29365 (emphasis added).

Respondent's position in this proceeding is consistent with this policy, as it addresses disposition of existing stocks after a section 6(b) cancellation proceeding, and where Respondent

clearly notified registrants and their customers in 2008 to anticipate the cancellation of any rodenticide products that were not modified to prevent unreasonable risks to children, pets, and non-target wildlife before a date certain. By the time a final decision on cancellation is rendered, it is likely that more than six years will have elapsed since the issuance of the Agency's Risk Management Decision, and every registrant other than Reckitt will have modified its registrations to meet those risk management goals.

Third, Reckitt's claim that Respondent's intention not to allow sale or distribution of existing stocks after a final cancellation hearing is merely "punitive" or is somehow evidence of the Agency picking on them is inconsistent with the facts. No order on existing stocks can be issued unless, at the conclusion of the cancellation proceeding, the final decision concludes that Reckitt's products do, in fact, pose unreasonable risks. Respondent's intention not to allow sale or distribution of existing stocks of the d-CON products cancelled in this proceeding is fully consistent with EPA's responsibility to protect health and the environment from unreasonable risks resulting from the sale, distribution, and use of products adjudicated as causing unreasonable risks.

Fourth, Reckitt claims Respondent has treated it unfairly relative to other rodenticide registrants who have voluntarily amended their product registrations to adopt the risk mitigation measures Respondent asks of Reckitt; however those claims do not withstand scrutiny. Prior to issuance of the Notice of Intent to Cancel, Respondent met with representatives of the last three registrants that still failed to comply with the terms of the Risk Management Decision. Following that meeting, two of the registrants submitted conditional requests for voluntary cancellation; Reckitt chose instead, as was its right, to contest the proposed cancellation. Both of the other registrants conditioned their cancellation requests on EPA allowing certain existing

stocks provisions. The choice presented to Respondent at that time was either to accept the conditional requests for cancellation, or to deny the requests, forgo voluntary cancellation, and include additional products in the cancellation hearing. Respondent chose to accept the conditional cancellation requests for two risk-related reasons that are easily distinguishable from those presented by the d-CON products that would be cancelled in this proceeding:

(1) First and most important, both of the other rodenticide registrants presented Respondent with a choice between a relatively quick, voluntary, and certain removal of the two registrants' products from the market, or removal only after the culmination of a cancellation proceeding that Respondent estimated would not likely conclude before 2014 at the earliest. Given that the registrants could lawfully continue to produce additional product as well as sell and distribute it during a cancellation proceeding, Respondent concluded that granting the requests for voluntary cancellation and allowing limited sale and distribution of existing stocks would likely result in less use of the products (and less exposure to children, pets, and non-target wildlife) than would have occurred if the registrants contested the cancellation of their products. While these voluntary cancellations also preserved agency resources and minimized litigation risk (and could be justified on those grounds as well), Respondent's primary objective was minimizing the risks to health and the environment that gave rise to the cancellation action.[13]

[13] Moreover, if Reckitt would have voluntarily cancelled or amended its registrations as the other rodenticide registrants have, the resulting cancellation/amendment orders could have included comparable existing stocks provisions. Disposition of existing stocks of cancelled product was not a cause of the parties' inability to reach an agreement avoiding this cancellation proceeding. The "unfairness" here is that Reckitt now asks this Tribunal to compel Respondent to make concessions Respondent made to other rodenticide registrants, while excusing Reckitt from making the same concessions made by those other rodenticide registrants.

(2) Second, existing stocks of the d-CON products cancelled in this proceeding will present significantly greater comparative risks than those presented by rodenticide products cancelled before the commencement of this proceeding. When Respondent agreed in January 2013 to allow two registrants to distribute and sell existing stocks of their cancelled rodenticides, Reckitt, the leading seller of consumer-use rodenticides, was actively selling and distributing products posing comparable risks, and was expected to continue to do so until the successful completion of this cancellation proceeding, no matter what position the Agency took with respect to the two cooperating rodenticide registrants. Given the large presence of Reckitt's products in the market then and over the expected duration of this proceeding, it is unlikely that refusal to allow sale and distribution of existing stocks of the cooperating registrants' products would have had any meaningful impact on reducing the unreasonable risks to children, pets, and non-target wildlife that will continue during the cancellation proceeding.

After a final decision is issued at the conclusion of the hearing, however, the rodenticide market will be dramatically different. By the time this proceeding is expected to end, essentially all of the rodenticide products available on the market – other than the cancelled d-CON products –will conform to EPA's risk management goals. Thus, prohibiting the sale and distribution of existing stocks of the cancelled d-CON products will, at that time, immediately provide meaningful protection for children, pets, and non-target wildlife. It is because Reckitt's cancelled d-CON products will at that time present uniquely higher risks to health and the environment than all available alternatives, and

not any prejudicial animus against Reckitt, that motivated Respondent's existing stocks determinations with respect to Reckitt's products. [14]

Finally, Reckitt's claims that there is a conflict between Respondent's position regarding existing stocks of cancelled products in the NOIC at issue in this proceeding and EPA's positions in past NOICs are without merit. Although there are factual differences between the various NOICs (and necessarily so), those differences do not indicate any inconsistencies in Respondent's legal position. Respondent does not dispute that it has the *authority* to include issues regarding existing stocks of cancelled products within the scope of a cancellation proceeding or that it has done so in certain instances. But the Agency *has not* taken the position (nor could it, consistent with *Cedar Chemical*) that other parties have the right to insist that issues regarding existing stocks be within the scope of a cancellation proceeding. It is unreasonable to construe EPA's prior exercise of its discretion as an implicit concession that such exercise was in fact an obligation flowing from the rights of the registrant.

Any differences in the Agency's treatment of existing stocks of cancelled products in past NOICs are inconsequential. First, the cancellation actions cited by Reckitt at pages 12-13 of the Motion are more than 20 years old, and there is insufficient recent history of NOICs to establish a current EPA pattern or practice with which the NOIC in this proceeding could be compared.

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[14] This differing treatment is consistent with the Existing Stocks policy, which provides that cancelled products should be treated differently based on the nature of the competing products available on the market: "The Agency may allow the continued sale, distribution, and use of existing stocks of a voluntarily cancelled product raising risk concerns without performing a risk/benefit analysis if similar products with substantial share of the market remain on the market. For example, if a registration raising risk concerns is cancelled voluntarily, the Agency may examine whether the cancelled registration comprises a significant share of the market for the particular active ingredient and use pattern, and the circumstances surrounding the cancellation. If the cancelled registration does not comprise a significant share of the market, a prohibition on existing stocks would not be likely to significantly reduce environmental risks, because similar products would continue to be sold and used. Further, the Agency believes that it makes sense to encourage the early, voluntary cancellation of registrations when risk concerns arise." 56 Fed. Reg. at 29365.

Accordingly, there is no basis for considering this NOIC inconsistent with Agency practice. Second, although significant factual differences between those cancellation actions cited by Reckitt and the instant case are readily apparent,[15] the full factual circumstances leading to those actions and necessary for their reliable interpretation are not in evidence. As a result, comparisons of the Agency's rational for differing treatment of existing stocks in these different actions must be superficial or speculative, or both.

## V. Conclusion

The Administrator determined in *Cedar Chemical* – and the Ninth Circuit affirmed in *Northwest Food Processors* – that FIFRA does not create any right to a hearing on the

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[15] Like the NOIC in this proceeding, the 1988 NOIC regarding inorganic arsenicals in non-wood preservative uses (53 Fed. Reg. 24787, 24794 (June 30, 1988) explained the Respondent's intention not to allow sale or distribution of existing stocks of products cancelled pursuant to the proceeding. Unlike the NOIC in this proceeding, the 1988 NOIC did not announce the Respondent's determination that the disposition of existing stocks would not be at issue in the proceeding, and the disposition of existing stocks was subsequently considered in that hearing. *In re Protexall Products, Inc.*, 2 E.A.D. 854 (EPA July 26, 1989). Respondent's rationale for including disposition of existing stocks in the 1988 NOIC is not recorded.

In the 1982 Notice of Intent to Cancel or Restrict Registrations of Pesticide Products Containing Toxaphene, 47 Fed.Reg. 53,784, 53792-93 (1982)), Respondent also stated its intentions regarding existing stocks without a determination that the disposition of existing stocks would not be at issue in the proceeding. The toxaphene NOIC shows a set of existing stocks provisions finely tailored to the circumstances of that action, which differ from the circumstances of present case. Several are illustrative: First, EPA determined that use of existing stocks of cancelled toxaphene products would be the most desirable means of disposal of such products. *Id.* at 53785, 53787. In contrast, EPA has concluded that the d-CON products at issue in this proceeding would pose greater risk to health and the environment if they were used than if they are disposed of as waste. Second, the provisions of the toxaphene notice at 53788-89 allowing use of existing stocks was only available to registrants who agreed *within the first 30 days after issuance of the notice* to significant limits on use sites and locations, and reporting requirements as a condition of the distribution and use of existing stocks, and absent such agreement, required that they be disposed as waste within 90 days of issuance of the Notice. For toxaphene products that would be cancelled pursuant to that cancellation proceeding, existing stocks could only be made available for the use of certified applicators (*Id.* at 53789), a limitation Reckitt has strongly opposed. Third, the toxaphene existing stocks provisions were designed such that the diminishing quantity of existing stocks would be available for those uses where satisfactory alternative pesticides were not available, and prohibit their use where satisfactory alternatives were available. *Id.* at 53792 ("EPA has carefully assessed these uses and finds that cost-effective, efficacious alternatives are available, except in some instances, for dry and southern peas. Accordingly, the Agency is allowing the use of existing stocks for these uses."). In the instant case, EPA has determined that effective, affordable and safer alternatives to the d-CON products at issue in this proceeding are available. Moreover, use of agricultural pesticides such as toxaphene are highly seasonal, such that quantity of existing stocks resulting from a well-timed cancellation may be too small to be of significant regulatory interest. Even a casual examination of the differences in circumstances between the toxaphene action and this action reveals Reckitt's assertion of a "conflict" to be mere rhetoric.

disposition of existing stocks of cancelled products. Per *Shell Oil*, existing stocks of cancelled products can be at issue in a proceeding only if the notice of intent to cancel identifies existing stocks as being among the issues for resolution at the hearing. The NOIC giving rise to this proceeding, issued by the Assistant Administrator for Chemical Safety and Pollution Prevention under authority duly delegated by the Administrator, clearly states that existing stocks of cancelled products are not an issue in this proceeding. Accordingly, Reckitt's Motion For An Expedited Determination That EPA's Existing Stocks Decision Is Within The Scope of The Hearing must be denied.

Respectfully submitted,

4/25/2013
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## CERTIFICATE OF SERVICE

I hereby certify that the original and two copies of *Respondent's Response To Motion Regarding Whether Disposition Of Existing Stocks Of Cancelled Products Is Within The Scope Of The Proceeding* were filed with the Headquarters Hearing Clerk, and a copy hand delivered to the office of:

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