UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In re FIFRA Section 3(c)(2)(B) Notice of Intent to Suspend Dimethyl Tetrachloroterephthalate (DCPA) Technical Registration	)	
AMVAC Chemical Corporation; Grower-Shipper Association of Central California; J&D Produce; Ratto Bros., Inc.; and Huntington Farms,	)	**Docket No. FIFRA-HQ-2022-0002**
Petitioners.	)	

PETITIONER AMVAC CHEMICAL CORPORATION'S
OPPOSITION TO RESPONDENT'S
MOTION TO AMEND HEARING AND SCHEDULING ORDER

I. INTRODUCTION

Having just received the thoughtful Hearing and Scheduling Order Following Remand (the "Scheduling Order") from the Presiding Officer on October 3, 2022, which lays out a rational and reasonable schedule for consideration of AMVAC's pending hearing request in view of the Environmental Appeals Board's ("EAB's") September 28, 2022, Decision and Remand Order ("Remand Order"), Respondent Office of Pesticide Programs ("OPP") asks for a total re-write of the Scheduling Order. The re-write OPP seeks would eliminate any possibility of additional discovery, subpoenas, or prehearing briefs even before AMVAC could file a motion seeking discovery. In fact, OPP filed the Motion to Amend Hearing and Scheduling Order ("Motion") even before AMVAC approached it with potential discovery requests as the Scheduling Order had laid out (and which is the ordinary process envisioned by the Federal Rules of Civil Procedure, referenced in the applicable regulations and the Scheduling Order).

OPP's Motion should be denied. It is a procedurally improper attempt to circumvent the Scheduling Order and the regulations and Federal Rules underlying the Scheduling Order. The Motion also fails when its substance is considered. OPP does not develop its conclusory assertion that no discovery would potentially satisfy the applicable standard for additional discovery, Mot. at 7 n.10, beyond relying on cramped interpretations of the Remand Order to suggest that the scope of the hearing remains so narrow that no discovery might be appropriate. In fact, the Remand Order confirmed that the "typicality" of AMVAC's conduct was relevant, Remand Order at 22, that EPA's "course of performance" in administering the relevant Data Call-In ("DCI") was relevant, *id.*, and that the Presiding Officer should not defer to OPP even on technical matters. *Id.* at 25. All of these matters, and more, may provide grounds for granting a properly lodged motion for discovery filed in accordance with the Scheduling Order. OPP cannot credibly maintain that there is *no potential additional discovery* which might be appropriate in view of these and other findings in the Remand Order.

Additional discovery would allow the hearing to focus on the key points of disagreement between the parties instead of effectively serving as a deposition of multiple fact and expert witnesses, in which the existence of relevant facts, documents, witnesses, or legal contentions might be revealed for the first time. A hearing during which the parties are probing the bases of each other's assertions for the first time is not in the interests of the Presiding Officer, the parties, or, more broadly, the public, and is precisely what modern discovery is intended to avoid: "[t]rial by ambush is the stuff of Hollywood or TV movies … ." *Viero v. Bufano*, 925 F. Supp. 1374, 1380 (N.D. Ill. 1996); *cf. In the Matter of: Taotao Usa, Inc. et al., Respondents*, 2017 WL 6373569 at *7 (EAB 2017) (rejecting party's complaint of "trial by ambush" because that party had the opportunity to obtain depositions of EPA witnesses).

In the following sections, AMVAC first discusses the appropriate legal standards for evaluating OPP's Motion (Section II.A) and then discusses why OPP's motion fails in view of that standard. Section II.B addresses OPP's assertion that the schedule should be shortened to "more closely align" with a 75-day timeframe referenced in FIFRA that has already passed. Section II.C addresses OPP's assertion that the schedule must be shortened to adjust "incentives" for AMVAC. Finally, Section II.D discusses why the interests of justice favor retaining the schedule as currently set forth in the Scheduling Order, any why OPP's untimely motion fails to establish that there is no possible basis for additional discovery.

II. ARGUMENT

A. The Applicable Legal Standards

OPP's Motion only mentions in passing the framework under which it must be evaluated. The Motion states that it is made "pursuant to" 7 U.S.C. § 136a(c)(2)(B)(iv), Mot. at 1, but that section of FIFRA does not supply either the procedural or substantive framework for the motion. OPP's motion, made presumably pursuant to 40 C.F.R. § 164.60(a), must, as it relates to the elimination of discovery, be evaluated against the provisions of 40 C.F.R. § 164.51. The regulation states that discovery may be available if the Presiding Officer determines "(1) that such discovery shall not in any way unreasonably delay the proceeding, (2) that the information to be obtained is not otherwise obtainable and (3) that such information has significant probative value." 40 C.F.R. § 164.51(c) sets forth the "procedure" for discovery which, consistent with the Scheduling Order, first requires a motion *for* discovery (not against it) from a party to the proceeding. 40 C.F.R. § 164.51(c)(1).

To the extent the Motion seeks other relief (a shortening of the schedule, or an elimination of other elements of the schedule such as updated prehearing briefs) the Presiding Officer must determine if OPP properly invokes the Presiding Officer's authority to "take actions

… in conformity with statute or in the interests of justice." 40 C.F.R. § 164.40(d).[1] Sections II.B and II.C below address OPP's apparent arguments that conformity with FIFRA requires the relief it seeks. Section II.D explains why the interests of justice favor the schedule established by the Presiding Officer, including the potential for additional discovery, rather than OPP's requested relief.

B. Conformity with Statutory Timeframes Does Not Warrant the Relief Sought

OPP argues that eliminating discovery and shortening the schedule would "more closely align" the proceedings with a 75-day time frame established in 7 U.S.C. § 136a(c)(2)(B)(iv). Mot. at 4. But the 75-day limit has long passed, largely if not exclusively due to the litigation strategy voluntarily adopted by OPP. OPP agreed that the provisions of 40 C.F.R. Part 164, Subpart B, govern this proceeding. OPP Mot. Acc. Dec., ALJ Dkt. 12, at 7. That Subpart includes provisions for the conduct of hearings and the procedure and timelines for appeals.

OPP availed itself of a substantial procedural right under 40 C.F.R. Part 164, Subpart B – the right to file a Motion for Accelerated Decision ("MAD") pursuant to 40 C.F.R. § 164.91. Such a filing is contemplated only in EPA's regulations, not in 7 U.S.C. § 136a(c)(2)(B)(iv). If the MAD had been granted, and the grant upheld, it would have cut off AMVAC's right to the hearing the statute expressly calls for. OPP cannot now be allowed to foreclose Petitioners' opportunity to exercise rights granted by the regulations by complaining of a lack of "alignment" with the statute that is traceable to OPP's own decision to exercise a right created only by the regulations.

[1] The regulations separately provide that the Presiding Officer may *extend* deadlines for cause shown, 40 C.F.R. § 164.6(b), but do not contain provisions other than those cited above that address requests to *shorten* the schedule or eliminate discovery.

C. OPP's "Incentives" Argument Does Not Support Granting the Motion

At pp. 6-7 of the Motion, OPP argues that *not* shortening the timeframe as it requests "serves only to further reward AMVAC" and will "potentially allow[]" additional production of DCPA products such that the "commercial incentive" for compliance with the DCI will be lessened. OPP is purely speculating. OPP does not know the status of DCPA technical or end-use production and therefore has no basis in fact to allege that the current schedule benefits AMVAC commercially. OPP cites only the Ranganath Declaration, filed with the initial Prehearing Exchange, but that document does not provide any information concerning whether there is any material difference between a hearing occurring in mid-November versus mid-January versus mid-February.

In addition, OPP cites outdated information when it presents AMVAC's "latest stated position" concerning the initiation of certain studies and label amendments. Mot. at 6, referring to AMVAC's Opp. Mot. Acc. Dec., ALJ Dkt. 20 (June 21, 2022). OPP would not have needed to present four-month-old "latest stated position[s]" if it had participated in the settlement conference (or otherwise inquired with AMVAC) prior to filing its Motion.

Finally, even if OPP could establish that a commercial benefit would accrue to AMVAC by maintaining the current schedule instead of shortening it, that would not be a basis to deny AMVAC its rights under the regulations and broadly eliminate the right to discovery and further briefing. OPP cites no authority for the proposition that attempting to adjust "incentives" for registrants is a free-floating basis for the Presiding Officer to eliminate procedural rights otherwise available under the regulations. OPP only states that the Presiding Officer's prior Order on Respondent's Motion for Accelerated Decision, ALJ Dkt. 28 (the "Order"), "broadly recognized" that "one purpose of the short 75-day timeframe required by FIFRA … is to incentivize registrants to submit data in a timely manner." Mot. at 6, citing Order at 31. But the

Order contained no such finding, not even "broadly," in the discussion on p. 31 pertaining to an October 2022 deadline for EPA to complete certain registration reviews. And in any event, the EAB found that "the statutory deadline for the Agency to complete registration review is separate from the suspension proceeding related to the Data Call-In Notice." Remand Order at 18-19. If the October 1, 2022, deadline was not reason to constrain the scope of a hearing, it (and any related amorphous arguments regarding "incentives" arising from the structure of FIFRA) cannot be reason to constrain AMVAC's procedural rights in advance of the hearing.

D. The Interests of Justice Favor Retaining the Current Schedule and OPP Has Not Established that Discovery Might Not Be Appropriate

As the Presiding Officer determined when issuing the Scheduling Order following remand, the interests of justice weigh in favor of potentially permitting discovery (subject to evaluation against the standard in 40 C.F.R. § 164.51) and ensuring that the parties have sufficient time to prepare for a hearing, including by updating their prehearing briefs if desired. The Scheduling Order recognized the scope of the hearing may be different than originally anticipated based upon updated factual circumstances, factual stipulations, and the Remand Order's discussion of the appropriate standard.

In addition to being procedurally improper for failing to wait for a motion for discovery so that there would be a specific request to oppose, OPP asks far too much when it asks the Presiding Officer to determine that there is no conceivable way the criteria in 40 C.F.R. § 164.51 might be satisfied by any hypothetical motion for discovery. OPP makes two arguments, not addressed above, that discovery is not needed or not appropriate. Neither is persuasive, as explained immediately below followed by a discussion of why the Remand Order suggests exactly the opposite of what OPP argues concerning discovery.

1. *The EAB Remand Order Did Not Suggest Limiting Discovery*

OPP argues that "there is no indication in the Remand that the scope of a hearing should be expanded to such a degree that additional discovery, subpoenas, or additional briefing would be necessary or warranted." Mot. at 3. OPP further notes that "the Remand did not require additional discovery[.]"

As an initial matter, no one would expect an appellate tribunal to rule on the appropriate scope of discovery on remand unless that issue had been presented to the tribunal – here it was not, and the EAB did not.

To the extent the EAB addressed the "scope" of the hearing on remand, its discussion suggests that additional discovery may be appropriate, as discussed in more detail in Section II.D.3, below. OPP's arguments that the Remand Order limited the scope of the hearing (or "confirmed" it was so narrow that discovery could never be warranted) ignore the Remand Order. OPP persists in underlining, for emphasis, the "only matters" clause in the statutory standard in support of its argument that the scope remains so narrow that no discovery could be appropriate. Mot. at 2. But the EAB clearly rejected the argument that the "only matters" clause limits inquiry into the "fundamental component of the statutory language," *i.e.*, whether AMVAC took "appropriate steps." Remand Order at 13. OPP also lists things that the EAB indicated *were* necessary (evaluation of conflicting testimony, cross examination) or matters on which the EAB did not comment (additional exhibits, additional time to supplement the record) as though these passages communicate the EAB's unspoken view that no discovery could be appropriate. Mot. at 4. But OPP cannot make the Remand Order say something it does not. The EAB remanded this matter without taking any position on the final outcome, Remand Order at 28 n.14, or on any intermediate procedural step.

The only specific example OPP provides to support its claim that the Remand Order "narrowed the scope of issues" for the hearing is that the EAB agreed that EPA's legal authority to request the data is not at issue. Mot. at 4 n.7 (citing Remand Order at 23). But AMVAC has never challenged the legality of the DCI or the requests in it. AMVAC Appeal Brief, EAB Dkt. 2, at 30-31. OPP attempts then to twist the EAB's note by stretching it to cover not only the "legality of the 2013 DCI" but also the "necessity of the data required by that document." Mot. at 4 n.7. This misrepresents the Remand Order which, at 23, was only discussing "legality," not "necessity" of data requested by EPA. The discussion by the EAB occurs within the Board's conclusion that "AMVAC's waiver requests and the responses thereto may be relevant as to whether it took appropriate steps to secure the data required." Remand Order at 23. A waiver request, by nature, asserts that data that was requested (legally) is nonetheless not "necessary," and waiver requests are explicitly provided for by regulation, as the EAB also notes. The cited passage therefore does not reduce the scope of the hearing on remand.

2. *It Is Irrelevant That AMVAC Did Not Previously Move for Additional Discovery*

OPP makes much of the fact that AMVAC had not "indicated its unreadiness to go forward" five days prior to the initially scheduled hearing on July 1, 2022, and had not requested any additional discovery prior to the initially scheduled hearing. Mot. at 3.

OPP fails to mention that the scheduling order in effect for the initial hearing stated that "motions requesting additional discovery or extensions of time will not be granted absent *extraordinary circumstances*." ALJ Dkt. 8 at 4 (emphasis added). Additionally, as OPP notes, the Presiding Officer had denied a more limited request from AMVAC to extend the date for the Prehearing Exchange by one week, even though doing so would not have affected the prior hearing date. ALJ Dkt. 13. AMVAC's choice to focus its resources on preparing for the prior

hearing rather than filing what likely would have been fruitless discovery motions (based on the Presiding Officer's view at the time of the "narrow scope of the proceeding [or hearing]," *see* ALJ Dkt. 8 (at 4) and ALJ Dkt. 13 (at 2)), is irrelevant to the question of whether additional discovery may be appropriate now.

3. *The EAB Remand Order Confirms that Discovery May Be Appropriate*

The EAB's Remand Order establishes that discovery may serve the interests of justice in this matter and that the criteria for additional discovery in 40 C.F.R. § 164.51 might be satisfied by a properly lodged motion for discovery. First, the EAB confirmed that deference to OPP, even where an agency asserts "technical expertise," is inappropriate here. Remand Order at 25. As a result, the Presiding Officer must consider and adjudicate on a preponderance of the evidence standard, without deference to OPP, all of OPP's assertions concerning such matters as the "typicality" of AMVAC's behavior (which the EAB also confirmed was relevant), whether AMVAC was "abnormally" dilatory as OPP asserts, and whether AMVAC's waiver requests constituted appropriate steps based on the scientific and technical assertions therein. Remand Order at 22, 25. Exploring the facts relevant to these questions at hearing, without the benefit further discovery, will be inefficient and will not serve the interests of justice.

Additionally, the EAB confirmed that typicality and the "course of performance" are relevant to the "appropriate steps" factual inquiry. Remand Order at 22. While AMVAC had urged that EPA's actions could be relevant, the confirmation that they are, and may be "highly significant," *id.*, serves to focus the inquiry and may warrant additional discovery into additional documents pertaining to other OPP actions, and into communications and conduct by Agency employees beyond those proffered as witnesses by OPP.

In sum, it is plausible that AMVAC may identify, in a properly lodged motion for discovery, the need for information, documents, or witnesses pertaining to at least the topics

recited above that are significantly probative in view of the standard in the Remand Order and which AMVAC cannot otherwise access. The current Scheduling Order provides OPP ample time to respond to any motion for discovery that may be granted, and OPP has not, as discussed above, explained why that schedule should be shortened; as such, there is no basis to find that discovery would "unreasonably delay" the proceeding. OPP, as movant, bears the burden to negate any possible basis for discovery – its conclusory assertions do not accomplish this.

III. AMVAC WITNESS AVAILABILITY

The Motion also cites witness availability as a potential reason for selecting between the alternate dates it proposes for a hearing (on or about November 14, 2022, and on or about January 9, 2023). OPP made no attempt to confer with AMVAC regarding witness availability before filing the motion. Had OPP inquired, AMVAC would have advised that one of its witnesses, Ephraim Gur, whose testimony was specifically identified as relevant by the EAB, Remand Order at 22, is not available between November 7th and November 18th, or between January 9th and 13th.

IV. CONCLUSION

OPP has not articulated any reason why the hearing date must or should be changed. OPP's attacks on the Scheduling Order only serve to illuminate the wisdom of the Scheduling Order's provisions. If OPP had waited to participate in the settlement conference prior to filing the Motion, it would have had the most up-to-date facts about AMVAC's actions in connection with the DCI and would not have had to support its motion with AMVAC's four-month-old "latest stated position[s]." If OPP had waited for AMVAC to approach it about potential discovery, the parties could have conferred (as set forth in the Scheduling Order) and potentially avoided this additional briefing exercise. If OPP at least had waited for AMVAC to file a motion requesting discovery, the Presiding Officer could have addressed that targeted motion (and

OPP's response) with arguments tailored to the applicability of the factors in 40 C.F.R. § 164.51 to specified additional discovery requests instead of having to deal with this overbroad, procedurally improper motion that asks the Presiding Officer to analyze all hypothetical future discovery requests.

Neither the Scheduling Order nor the Federal Rules of Civil Procedure require a party to defend its entitlement to discovery in the abstract, before that party files a motion seeking discovery. AMVAC defends its entitlement to potential discovery here only so far as to illustrate that there *might* be topics worthy of additional discovery, and that additional discovery is not foreclosed by the Remand Order or any other source of law. AMVAC reserves its right to seek specified discovery in due course, in accordance with the Scheduling Order and controlling Agency regulations, after conferring with OPP as provided for in the Scheduling Order.

For all the foregoing reasons, OPP's Motion to Amend Hearing and Scheduling Order should be denied.

Date: October 17, 2022

Respectfully Submitted,

/s/ *Hume M. Ross*
David B. Weinberg
Tracy A. Heinzman
Keith A. Matthews
Hume M. Ross
WILEY REIN LLP
2050 M ST NW
Washington, DC 20036
Telephone: (202) 719-7000
dweinberg@wiley.law
theinzman@wiley.law
kmatthews@wiley.law
hross@wiley.law

Counsel for AMVAC Chemical Corp.

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Petitioner AMVAC Chemical Corporation's Opposition to Respondent's Motion to Amend Hearing and Scheduling Order**, was sent on October 17, 2022, to the following parties in the manner indicated below.

/s/ *Hume M. Ross*
Hume M. Ross

Copy by OALJ E-Filing System to:

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

Copies by Electronic Mail to:

Forrest Pittman
Pesticides and Toxic Substances Law Office
Office of General Counsel
U.S. Environmental Protection AgencyMail Code 2310A
1200 Pennsylvania Avenue NWWashington, DC 20460
Email: pittman.forrest@epa.gov

Counsel for Respondent

Cristen S. Rose
Haynes Boone
800 17th Street NW
Washington, DC 20006
Email: cristen.rose@haynesboone.com

Counsel for Grower Petitioners

Dated October 17, 2022