

**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;)	Docket No. FIFRA-HQ-2022-0002
Grower-Shipper Association of Central)	
California; Sunheaven Farms, LLC; J&D)	
Produce; Ratto Bros., Inc.; and Huntington)	
Farms,)	
Petitioners.)	

RESPONDENT’S MOTION TO AMEND HEARING AND SCHEDULING ORDER

Respondent, the United States Environmental Protection Agency (“EPA” or “the Agency”), pursuant to Section 3(c)(2)(B)(iv) of the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136a(c)(2)(B)(iv), hereby moves¹ before the Presiding Officer that the October 3, 2022 Hearing and Scheduling Order (“Order”) be amended, as follows:

- (1) Removing provisions on page 2 of the Order allowing for Additional Discovery, for the filing of motions for subpoenas, and for additional Prehearing Briefs; and
- (2) Rescheduling the hearing in this matter to begin on or about November 14, 2022, or, in the alternative, to begin as soon as possible in calendar year 2023 (*e.g.*, on or about January 9, 2023) to avoid difficulties related to witness availability during the holiday season.

¹ Both Petitioner AMVAC Chemical Corporation (“AMVAC”) and Petitioners Grower-Shipper Association of Central California; Sunheaven Farms, LLC; J&D Produce; Ratto Bros., Inc.; and Huntington Farms (“Grower Petitioners”) oppose this motion.

A brief partial summary of the procedural history in this matter is provided for context:

- May 27, 2022, AMVAC and Grower Petitioners requested a hearing;
- June 3, 2022, the Presiding Officer issued an Order Scheduling Hearing and Prehearing Procedures, setting a hearing to begin on June 6, 2022 (approximately 40 days after the requests for hearing);
- July 1, 2022, the Presiding Officer issued an order granting Respondent’s Motion for Accelerated Decision and cancelling the hearing scheduled to begin five days later;
- September 28, 2022, the Environmental Appeals Board (“Board”) remanded this case back to the Presiding Official with orders to conduct a hearing;
- October 3, 2022, the Presiding Officer issued the Order setting a hearing to begin on February 14, 2023 (approximately 139 days after the Remand).

Current Written Submissions are Sufficient to Develop the Record at Hearing and Make a Determination Pursuant to FIFRA Section 3(c)(2)(B)(iv).

FIFRA Section 3(c)(2)(B)(iv) provides, in relevant part:

The only matters for resolution at that hearing shall be whether the registrant has failed to take the action that served as the basis for the notice of intent to suspend the registration of the pesticide for which additional data is required, and whether the Administrator's determination with respect to the disposition of existing stocks is consistent with [FIFRA]. If a hearing is held, a decision after completion of such hearing shall be final. Notwithstanding any other provision of [FIFRA], a hearing shall be held and a determination made within seventy-five days after receipt of a request for such hearing.

(Emphasis added.) In its September 28, 2022 Decision and Remand Order (“Remand”), the Board ruled that “the statutory basis for the DCPA² NOITS³ must be that AMVAC ‘within the time required by the administrator, has failed to take appropriate steps to secure the data required.’” Remand at 13. “[T]he legal standard for determining whether the suspension should take effect is whether, within the time required by the Administrator, AMVAC failed to take

² Dimethyl tetrachloroterephthalate (“DCPA”), a pesticide active ingredient.

³ On April 28, 2022, EPA’s Office of Pesticide Programs (“OPP”) issued a Notice of Intent to Suspend a DCPA technical product registered to AMVAC, which initiated this administrative litigation. 87 Fed. Reg. 25262; JX 1, JX2.

appropriate steps to secure the data required by the [2013] Data Call-In Notice [(“DCI”)]⁴.” *Id.* at 19. The Board also ruled that “nothing in the statutory language or overall framework of FIFRA [] provides a basis for concluding that the seventy-five-day timeframe should narrow the scope of a suspension hearing.” *Id.* at 15. While the Board ruled that the Presiding Officer “must hold a hearing to determine whether AMVAC failed to take appropriate steps to secure the data listed in Table 2 of the DCPA NOITS and, if so, whether the provisions of the DCPA NOITS concerning existing stocks are consistent with FIFRA,” 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. *Id.* at 28. As of July 1, 2022, no party had indicated its unreadiness to go forward with the hearing scheduled to begin five days later, and the Presiding Officer had denied AMVAC’s June 10, 2022 Motion for Extension of Time for Primary Discovery,⁵ finding no good cause for extending the statutory deadline. Given the Board’s close adherence to the plain language of the statute, the narrow scope of FIFRA Section 3(c)(2)(B)(iv) weighs in favor of holding the required hearing limited to developing the record based on what was already produced.⁶ *See id.* at 12.

Indeed, the Remand contains numerous indications that the required hearing should be limited to evidence already in the record at the time of the July 1, 2022 Order on Respondent’s Motion for Accelerated Decision (“Accelerated Decision”). Specifically, the Board notes that the Presiding Officer should: consider the conflicting verified written statements submitted by the

⁴ Generic Data Call-In Notice 078701-1140 (January 31, 2013). JX 4.

⁵ Importantly, Petitioners did not make any motion for “other discovery” pursuant to 40 CFR § 164.51, and AMVAC specifically noted that it was “not requesting any delay of the hearing in connection with [its] motion.”

⁶ Pursuant to the Presiding Officer’s Order, Respondent is reviewing all 20 data deficiencies listed in the NOITS, with respect to whether each is still at issue. If Respondent determines that AMVAC has taken appropriate steps with respect to any data requirement, certain documents currently in the record may no longer be relevant.

parties on June 17, 2022, as part of the initial prehearing exchanges; consider “AMVAC’s waiver requests and the responses thereto”; provide “an opportunity to cross examine the witnesses who provided conflicting statements”; and “evaluate[] the credibility of those witness based on live testimony.”⁷ *Id.* at 22-23. The record currently before the Presiding Officer contains all of the documents and witnesses’ written direct testimony to adequately address the scope of the hearing as defined by the Board. The Board ruled that “[a] hearing is necessary to develop an adequate record to reach a conclusion”; it clearly did not rule that additional exhibits or direct witness testimony were necessary to accomplish that task, or that petitioners should be provided more time to request an opportunity to supplement the written record.⁸ *Id.* at 23 (emphasis added). Accordingly, Respondent moves that the Presiding Officer amend the Order to remove provisions that allot additional time to request Additional Discovery, for the filing of motions for subpoenas, and for Prehearing Briefs.

The Hearing Should be Conducted as Soon as Practicable to More Closely Align with the 75-Day Timeframe of FIFRA Section 3(c)(2)(B)(iv).

Additionally, the Board recognized that the timeframe for holding a hearing and issuing a determination on suspension under FIFRA Section 3(c)(2)(B)(iv) is 75 days. Remand at 15 (noting that the determination period for cancellation under FIFRA Section 6(e) “is also seventy-five days”). While the Board contemplated that “a hearing on appropriate steps may prove to be more complicated than Congress anticipated” when setting a 75-day timeframe for a hearing and

⁷ In some respects, the Board specifically narrowed the scope of issues appropriate for resolution at the hearing. For instance, the Board agreed with Respondent that the legality of the 2013 DCI and the necessity of the data required by that document “is not at issue in this proceeding.” Remand at 23 (citing Atochem N. Am., Inc. v. EPA, 759 F. Supp. 861, 864 (D.D.C. 1991); *cf.*, *e.g.*, Petitioner AMVAC’s Notice of Exceptions and Appeal Brief at 35.

⁸ *Supra* n.5. If Petitioners seek further discovery, 40 C.F.R. § 164.51 outlines necessary conditions, not present in the instant case, that must be demonstrated.

determination, the Remand pointedly did not extend the time in which a hearing should occur or otherwise depart from the plain language of FIFRA Section 3(c)(2)(B)(iv). *Id.* That the Board ultimately interpreted the scope of such suspension hearings as requiring a different finding than the Presiding Officer did in the Accelerated Decision should not be read as expanding the statutory timeframe in order to allow for subsequent rounds of briefing, filing and enforcing of subpoenas, or “other discovery” as in non-time-limited proceedings conducted under 40 CFR Parts 164 or 22. *Cf.* 40 CFR §§ 164.51, 22.19(e).

Although the 75-day timeframe for a hearing and discovery in this matter would have expired on or about August 10, 2022, the subsequent delay ultimately results from the Remand. Prior to granting Respondent’s Motion for Accelerated Decision, the Presiding Official’s June 3, 2022 scheduling order clearly sought to provide adequate time in which to hold a hearing, issue a determination, allow for the filing of exceptions to that determination, and to allow for the Board’s brief consideration of exceptions within that 75-day timeframe. To that end, a hearing was initially scheduled to begin on July 6, 2022, approximately 40 days after Petitioners filed their requests for hearing. The Presiding Officer denied AMVAC’s June 10, 2022 Motion for Extension of Time for Primary Discovery, finding no good cause for extending the statutory deadline. Respondent maintains that no such good cause exists, and that the Board’s interpretation of the scope of the hearing does not create any reason to depart from the clear statutory timeframe.

The facts of this matter have not substantively changed⁹ in the several months since the original hearing was scheduled, and the parties have presumably retained familiarity with the

⁹ Respondent acknowledges that, during the pendency of this case, AMVAC has submitted several studies in furtherance of complying with the 2013 DCI. OPP is diligently reviewing these submissions and expects that it will be able to make a determination as to whether the respective data requests that are the subject of the NOITS have been resolved, in compliance with the October 3, 2022 Order.

subject matter given the subsequent proceedings before the Board. As of July 1, 2022, no party had indicated its unreadiness to go forward with the hearing scheduled to begin five days later. Following the Remand, the parties were returned to a position substantially similar to where they were prior to the Accelerated Decision. Respondent maintains that 40 additional days to prepare for a hearing is sufficient, given the narrow statutory scope of the hearing, which has now been clearly articulated by the Board. That time period is sufficient for all parties to resume preparation for hearing while still complying with the other aspects of the Order, including settlement discussions and joint stipulations.

Furthermore, one purpose of the short 75-day timeframe required by FIFRA Section 3(c)(2)(B)(iv) is to incentivize registrants to submit data in a timely manner. The Presiding Officer broadly recognized that purpose in the Accelerated Decision, noting that continued delay by registrants in providing data to the Agency results in undue reward to registrants by means of delayed compliance costs. Accelerated Decision at 31. The Remand in no way contradicts the Presiding Officer's initial conclusion concerning incentives. In the instant case, AMVAC's latest stated position with respect to at least five data requirements of the 2013 DCI is that the data are not needed. *See* AMVAC's Opposition to Respondent's Motion for Accelerated Decision ("Opposition") at 30 (maintaining that clearly-insufficient label changes negate the need for submission of four residue studies), at 37-38 (maintaining a clearly-erroneous position that AMVAC would not perform a chronic sediment toxicity study required by the 2013 DCI unless EPA "formally add[s]" another study to the DCI to allow AMVAC to perform a less-onerous alternate study). For these, and potentially others, AMVAC continues to delay initiation of studies clearly required by the 2013 DCI. Deferring resolution of this suspension case serves only to further reward AMVAC, potentially allowing sufficient production of the DCPA

technical product at issue for a full growing year and removing much of the commercial incentive for AMVAC to comply with the 2013 DCI. *See* Ranganath Statement. Respondent acknowledges that, for purposes of witness availability, scheduling may be difficult near the end-of-year holidays. Accordingly, Respondent moves that the Presiding Officer amend the Order to reschedule the hearing to begin on or about November 14, 2022, or in the alternative, on or about January 9, 2023.

Conclusion

As explained above, the Remand did not require additional discovery, subpoenas, or additional briefing or suggests such additional process was needed.¹⁰ All parties were apparently ready to proceed to the previously scheduled hearing with approximately 40 days of preparation. Further delay of the hearing contravenes the statutory purpose of incentivizing AMVAC's compliance with the 2013 DCI. Accordingly, there is no reason to delay resolution of this matter. The hearing is currently scheduled to begin on February 14, 2023, approximately 139 days after the Board issued the Remand. As the parties' position is substantially similar to where they were prior to the Accelerated Decision, Respondent asserts that a similar amount of time to prepare for hearing is appropriate. Accordingly, Respondent moves that the Presiding Officer amend the Order to remove provisions that allot additional time to request Additional Discovery, for the filing of motions for subpoenas, and for Prehearing Briefs, and to reschedule the hearing to begin on or about November 14, 2022, or in the alternative, on or about January 9, 2023.

¹⁰ The Order generally reflects the "other discovery" provisions of 40 CFR § 164.51 (and the analogous provision in 40 CFR § 22.19(e)). Respondent asserts that the statutory basis and facts of this case are such that the Presiding Officer cannot determine "that such discovery shall not in any way unreasonably delay the proceeding." *See* § 164.51(a)(1). Although Petitioners have not yet requested additional discovery, Respondent asserts that no outstanding evidence exists with "significant probative value" requiring delay of the hearing.

Dated: October 7, 2022

Respectfully submitted,

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***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; Sunheaven Farms, LLC; J&D Produce; Ratto Bros., Inc.; and Huntington Farms, Petitioners.
Docket No. FIFRA-HQ-2022-0002

CERTIFICATE OF SERVICE

I hereby certify that the foregoing **Motion to Amend Scheduling Order**, dated October 7, 2022, was sent this day to the following parties in the manner indicated below.

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Dated October 7, 2022