

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Health Care Products, Inc.) FIFRA Docket No. 656
)
Petitioner)

ORDER ON MOTION TO LIMIT ISSUES

On August 4, 1993, pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") Section 6(b), 7 U.S.C. §136d(b), and the regulations at 40 C.F.R. Part 164, the United States Environmental Protection Agency ("EPA" or the "Agency") filed and published a notice of intent to cancel the registration of WipeOut Cold Sterilizing Disinfecting Solution ("WipeOut"), a pesticide registered by Health Care Products, Inc., a company headquartered in Mississauga, Ontario, Canada ("HCP" or "Petitioner"). On September 3, 1993, HCP filed objections to the notice and requested a hearing.

On February 17, 1994, the former presiding Administrative Law Judge ("ALJ") in this proceeding, Judge Daniel M. Head, granted the Agency's motion to amend its notice of intent to cancel. The Agency filed and published its amended notice on April 22, 1994. The proceeding was then stayed until November 15, 1994 by order of Judge Head while HCP was under criminal investigation by the United States Attorney for the District of Columbia. After the U.S. Attorney declined prosecution, Petitioner filed, on January 15, 1995, additional objections to the amended notice of intent to cancel the WipeOut registration. EPA filed motions seeking further elaboration of those objections in accord with the requirements of 40 C.F.R. §164.22. Pursuant to an order of Judge Head, HCP filed supplemental objections to the notice of intent to cancel on October 30, 1995.

Pursuant to a scheduling order, the EPA filed a motion to limit issues in this proceeding, dated February 26, 1996. Respondent filed an opposition to that motion on March 31, 1996. EPA filed a motion for leave to reply, with the proposed reply, on May 17, 1996.

The Agency frames its motion in terms of proposing an order that would exclude from the hearing:

"a. Any evidence that pertains exclusively to any enforcement actions that have been taken or may be taken against Petitioner or any successor in interest and that do not pertain to the registration status of the product

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subject to the instant cancellation proceeding.

b. Any evidence that is not probative of the efficacy of WipeOut Cold Sterilizing and Disinfecting Solution (which is the sole product subject to the Notice of Intent to Cancel), the efficacy of any substitute product, or the risks or benefits of the registration or use of WipeOut Cold Sterilizing and Disinfecting Solution;

c. Any evidence that would be admissible only if a standard other than FIFRA Section 3(c) governs the registration decisions concerning the product at issue in this proceeding or Section 6(b) governs the cancellation action that is the subject of this proceeding;

d. Any evidence that pertains to arguments that have been presented and rejected in this proceeding on matters that have already been resolved in this proceeding."¹

EPA is concerned that some of the Petitioner's objections raise matters outside its view of the proper scope of the issues in this cancellation proceeding. Petitioner counters by characterizing EPA's motion as a motion *in limine* that seeks to prematurely exclude broad categories of evidence.

Whether or not EPA's motion is properly characterized as a motion *in limine*, it is premature. Although the Agency does, in its reply brief, substitute the word "matters" for "evidence",² it is plain that "limiting issues" will have the effect of limiting Petitioner's evidence. As a general proposition, there is nothing wrong with the Agency's attempt to limit issues to those relevant to the legal standards for the cancellation of the subject pesticide, WipeOut. However the examples given of the type of evidence the Agency would exclude illustrate that no ruling can be made at this juncture on their relevancy or admissibility. The parties to this proceeding have yet to engage in the exchange and discovery procedures required by 40 C.F.R. §§164.50 and 164.51. HCP has not yet had an opportunity to present its evidence with, if necessary, an offer of proof to demonstrate its relevance to the cancellation standards.

EPA's own motion demonstrates its prematurity. Just as one example, the Agency cites studies by the New Mexico State University laboratory, submitted by HCP, on the efficacy of WipeOut Disinfectant Spray. EPA then says "[t]he studies have not yet been shown to be relevant to the efficacy of WipeOut Cold Sterilizing

¹ Proposed Order, February 26, 1996.

² Reply to Petitioner's Opposition to Respondent's Motion to Limit Issues in this Proceeding, May 17, 1996, p. 3.

Disinfecting Solution." ³ (emphasis added). That is precisely the point. If Respondent offers those studies into evidence at the hearing it will presumably present an expert witness to testify to their relevance. It also doesn't take a great leap of logic to infer that a study of the efficacy of WipeOut spray might have some relevance to the efficacy of WipeOut solution.

As the EPA states in its motion, the Agency can certainly reserve its right to object to the introduction of any evidence it believes irrelevant or immaterial to the issues in this proceeding.⁴ Such objections or motions to exclude evidence will be considered at the appropriate time, after discovery is completed, or during the hearing itself. The EPA's Motion to Limit Issues is denied.

Schedule for Further Proceedings

I find it unnecessary to hold another prehearing conference in this proceeding. Pursuant to 40 C.F.R. §164.50 the parties are directed to comply with the following schedule for the exchange of primary discovery and for the other purposes of the prehearing conference.

The parties shall each file their initial primary discovery, consisting of an exchange of witness lists and documents, pursuant to 40 C.F.R. §164.50(b), by July 31, 1996. The parties may then file, without a motion, a supplemental exchange by August 23, 1996.

In accord with §164.50(a) the parties may also address the simplification of issues, stipulating to certain facts and documents, hearing procedures including the use of verified written statements in lieu of oral direct testimony, and setting a time and place for the hearing. The parties may also present their views on coordinating this hearing with the pending enforcement hearings against HCP.

If any party seeks further discovery, it must first be sought on a voluntary basis. I expect the parties to honor reasonable requests for production of data and other supporting documents. If such discovery cannot be completed by agreement, a motion may be made pursuant to 40 C.F.R. §164.51. Any such motions must be filed by September 10, 1996. Replies will follow the procedure set forth in §164.60.

³ Motion to Limit Issues in this Proceeding, February 26, 1996, p. 13.

⁴ Id., p. 10.

Andrew S. Pearlstein

Andrew S. Pearlstein
Administrative Law Judge

Dated: June 25, 1996
Washington, D.C.

CERTIFICATE OF SERVICE

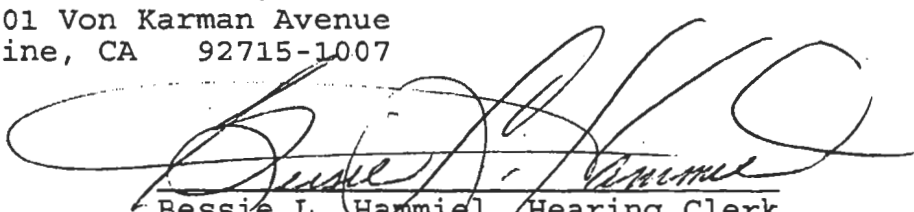
I do hereby certify that the foregoing Order On Motion To Limit Issues was filed in re Health Care Products, Inc.; FIFRA Docket No. 656 and exact copies of the same were mailed to the following as indicated below:

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Dated: June 25, 1996