

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
REQUEST TO REDUCE PRE-HARVEST) **Docket No. EPA-HQ-OPP-2007-0181**
INTERVAL FOR EBDC FUNGICIDES)
ON POTATOES)
)

**ORDER ON MOTION TO WITHDRAW HEARING SCHEDULE
AND MOTION TO INTERVENE**

I. Background

Since 1948, fungicides containing ethylene bisdithiocarbamates (EBDCs) have been registered under the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136 *et seq.* (FIFRA).¹ In March 1992, the U.S. Environmental Protection Agency (EPA), which is responsible for enforcing FIFRA, issued a “Notice of Intent to Cancel” and “Conclusion of Special Review” (Cancellation Order) indicating, *inter alia*, that it intended to cancel the registrations of products containing EBDCs used on certain crops such as potatoes unless the registrations and labeling on such products were modified to reflect a “minimum preharvest interval [time between the last pesticide application and harvest] [of] - 3 days in Connecticut, Florida, Maine, Massachusetts, New Hampshire, New York, Pennsylvania, Vermont, and Wisconsin and at least 14 days elsewhere.”² 57 Fed. Reg. 7484, 7526 (Mar. 2, 1992).

¹ Under FIFRA, the term “fungus” is defined as “any non-chlorophyll-bearing thallophyte (that is, any non-chlorophyll-bearing plant of a lower order than mosses and liverworts), as for example, rust, smut, mildew, mold, yeast, and bacteria, except those on or in living man or other animals and those on or in processed food, beverages, or pharmaceuticals.” 7 U.S.C. § 136(k). The Administrator of EPA can declare a fungus to be a “pest” under FIFRA (7 U.S.C. § 136w(c)(1)) thus making a fungicide, *i.e.*, a substance for “preventing, destroying, repelling or mitigating” the fungus, such as the EBDC containing products known as mancozeb, metiram, or maneb, a “pesticide” under FIFRA (7 U.S.C. § 136(t), 136(u)) subject to the Act’s registration requirements and restrictions.

² FIFRA provides that only pesticidal products that perform their intended function without causing “unreasonable adverse effects” to “man or the environment” may be registered thereunder and, as such, lawfully sold or distributed in either intrastate or interstate commerce. *See*, 7 U.S.C. §§ 136(bb), 136a. The Act gives the Administrator the authority to undertake a risk/benefit analysis and in order to reduce risk, condition registration on meeting certain labeling

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Subsequently, in May 1992, EPA extended the shorter 3-day preharvest interval (PHI) to Delaware, Michigan, Ohio and Rhode Island. *See*, 61 Fed. Reg. 42244, 42245-46 (Aug. 14, 1996). In December 1996, the EBDC/ETU Task Force (“EBDC Task Force”)³ requested EPA further modify the Cancellation Order to apply *nationwide* the 3-day PHI on EBDC fungicides applied to potatoes to address the spread of “late potato blight” disease.⁴ The EBDC Task Force and/or its members resubmitted its request to EPA in August 2003 as part of the reregistration process for the EBDC products. In 2005, EPA completed its evaluation of the PHI issue on EBDC fungicides used on potatoes and found the proposal to extend the 3-day PHI nationwide meritorious. 72 Fed. Reg. 37771-72 (July 11, 2007).

About two years later, on July 11, 2007, pursuant to 40 C.F.R. § 164.131(c), EPA published in the Federal Register its “Notice of Hearing on Request to Reduce Pre-Harvest Interval for EBDC Fungicides on Potatoes” (Notice of Hearing) indicating its intent to modify the Cancellation Order to extend the 3-day PHI nationwide as requested by the EBDC Task Force (the “Applicant”) and hold a public hearing thereon pursuant to 40 C.F.R. § 164.131(c). 72 Fed. Reg. 37771 (July 11, 2007). The Notice of Hearing established a 30 day period for responses to it and extremely short deadlines for the hearing to be held and decision issued thereon. 72 Fed. Reg. at 37778. It further noted that “if no other interested party requests a hearing, the Agency [“Respondent”] intends to file a motion pursuant to 40 CFR 164.60 requesting that the Administrative Law Judge issue an accelerated decision pursuant to 40 CFR 164.91(a)(8) in favor of modifying the Cancellation Order as requested,” thereby obviating the need for taking further evidence. 72 Fed. Reg. at 37778.

Subsequently, by letter dated August 10, 2007, the National Resources Defense Council (NRDC) responded to the Notice of Hearing indicating that it opposed extending the 3-day PHI nationwide, and requested participation in the hearing as well as a modification of the hearing schedule to allow sufficient time for discovery and hearing preparation.⁵ Thereafter, on August

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requirements. 7 U.S.C. § 136a. EPA initiated this second “Special Review” of EBDC containing pesticides in 1987 because of concerns that their use may pose a risk of inducing in humans carcinogenic, developmental and thyroid effects as a result of exposure to EBDC residue containing ethylenethiourea (ETU) a “common contaminant, metabolite, and degradation product” of EBDC pesticides. 57 Fed. Reg. at 7485, 7487. *See also*, 40 C.F.R. § 154.1 *et seq.*

³ According to the EBDC/ETU Task Force it currently consists of four companies: BASF Corporation, Dow AgroSciences, LLC, E.I. du Pont de Nemours and Company and United Phosphorus, Inc., all of whom hold FIFRA registrations on products containing EBDC. *See*, EBDC Task Force Notice of Appearance filed in this matter on August 24, 2007.

⁴ “Late potato blight,” or *phytophthora infestans*, is a fungal disease which can attack and destroy potato crops. 72 Fed. Reg. 37771 (July 11, 2007).

⁵ NRDC represents in its Letter that it is a “non-profit organization with more than
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30, 2007, this Tribunal issued an Order Regarding Hearing Schedule advising that under the circumstances the abbreviated deadlines established in the Notice of Hearing for the holding of the hearing and issuing a decision were inconsistent with due process and unachievable, and suggested three alternative subsequent courses of action for the Agency to take.⁶

II. EPA's Motion to Withdraw Proposed Hearing Schedule

In response to the August 30th Order, by Motion dated September 7, 2007, EPA moved to withdraw the hearing and decision schedule set in the Notice of Hearing and proposed that a new schedule be established by the undersigned after consultation with the parties, consistent with the applicable procedural rules set forth in 40 C.F.R. Part 164.⁷ A Certificate of Service

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500,000 members dedicated to protection of public health and the environment.” Further, it claims that its “members and their children are exposed to EBDC fungicides and their metabolites as a result of the food use on potatoes” [sic] and that a “decision granting the applicant’s request to reduce the pre-harvest interval for EBDC fungicides would increase the risk of harm to NRDC’s members and their children from dietary exposure to these pesticides and their metabolites. On this basis, although the Subpart D Rules do not explicitly provide for it, the NRDC’s request to participate in the hearing is **granted** based upon the allegation that its interests, and those of its members, will be significantly and adversely affected by the modification to registration proposed in the Notice of Hearing.

⁶ Subpart D provides that “The issues in the hearing shall be whether: (1) Substantial new evidence exists and (2) such substantial new evidence requires reversal or modification of the existing cancellation or suspension order. The determination of these issues shall be made taking into account the human and environmental risks found by the Administrator in his cancellation or suspension determination and the cumulative effect of all past and present uses, including the requested use, and uses which may reasonably be anticipated to occur in the future as a result of granting the requested reversal or modification. The granting of a particular petition for use may not in itself pose a significant risk to man or the environment, but the cumulative impact of each additional use of the cancelled or suspended pesticide may re-establish, or serve to maintain, the significant risks previously found by the Administrator.” 40 C.F.R. § 164.132.

⁷ The procedural rules applicable to this proceeding are the Rules of Practice for Applications Under Sections 3 and 18 to Modify Previous Cancellation or Suspension Orders, at 40 C.F.R. Part 164 Subpart D (“The procedures set forth in this subpart D shall govern all such applications” to allow use of a pesticide at a site and on a pest for which registration has been finally cancelled or suspended.). Subpart D consists only of Section 164.131 addressing review by the Administrator of applications and publication of denial or acceptance of reconsideration, 164.132 providing procedures governing the hearing, and Section 164.133 addressing emergency waiver of hearing. Section 164.132(b) provides in part that “the presiding officer shall make recommendations, including findings of fact . . . and to the extent feasible, as determined by the

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accompanying the Motion indicates that EPA served it on the EBDC Task Force and the NRDC by mail.⁸

Rules 164.60 and 164.6(c) (40 C.F.R. §§ 164.60 and 164.6(c)) provide for a 10 day period for responses to motions plus an additional 3 days for documents served by mail, and to date, no specific response to EPA's Motion has been received, although other filings received to date in this matter support a postponement of the deadlines set in the Notice of Hearing. *See*, NPC and NRDC filings discussed below. Therefore, for good cause shown, the EPA's Motion is **GRANTED** and the deadlines for holding the hearing and issuing a decision thereon established in the Notice of Hearing are hereby vacated. A prehearing order establishing further deadlines in this matter will issue shortly.

III. National Potato Council's Motion for Leave to Intervene

By Motion dated August 30, 2007, the National Potato Council (NPC) filed a Motion to Intervene in this proceeding pursuant to 40 C.F.R. §§ 164.132(b) and 164.31. In the Motion, NPC represents that it is "the only trade association representing commercial potato growers in all 50 States" and that its "members use EBDC fungicides and will be substantially affected by the outcome of this proceeding." Further, NPC states that "late blight has spread throughout the United States," and that it supports the EBDC Task Force's "efforts to reduce the PHI to 3 days in all States, as that will provide farmers with an effective, economical means to control late blight, a devastating disease," and rectify the "inequitable treatment of potato growers in different states" resulting from the two alternative PHI intervals now applicable (3 days and 14 days). NPC attached to its Motion a proposed document (NPC Letter dated August 29, 2007) detailing its responses to the issues of fact and law set forth in the Notice of Hearing and raising no additional issues other than a request that EPA's proposed hearing schedule be modified to provide additional and adequate time to prepare for hearing.

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presiding officer, the procedures *at the hearing* shall follow the Rules of Practice, set forth in subparts A and B of this part 164." The literal interpretation of this provision is that only the procedures applicable *during* hearings, that is, Sections 164.70 through 164.182 of Subpart B, are to be followed for Subpart D proceedings, as Subpart A and other sections in Subpart B do not include procedures applicable *at the hearing*. However, that interpretation would leave Subpart D proceedings without any prehearing and other important procedures, and would make the words of Section 164.132(b) "in subpart[] A" meaningless. Therefore, all of Subparts A and B will be considered as guidance in this proceeding.

⁸ As a courtesy, it would have been appropriate for the Agency to have also served its Motion on the National Potato Council (NPC) who, on August 30, 2007, filed a Motion for Leave to Intervene in this matter, as indicated below. However, since the NPC was not a party to this matter at the time the Agency's Motion was filed and since the NPC also requested in its Motion that the hearing schedule as initially set in the Notice of Hearing be revised, there is no reason at this point to delay ruling on the Motion to give the NPC an opportunity to respond.

NPC stated in its Motion that it conferred with counsel for EPA and NRDC and neither opposed its Motion. To date, no response to NPC's Motion has been received.⁹

The Rule on intervention, Rule 164.31, provides in pertinent part:

(a) Motion. Any person may file a motion for leave to intervene in a hearing conducted under this subpart. A motion must set forth the grounds for the proposed intervention, the position and interest of the movant in the proceeding and the documents proposed to be filed pursuant to either § 164.22 or § 164.24.

(b) When filed. A motion for leave to intervene in a hearing must ordinarily be filed prior to the commencement of the first prehearing conference. * * * *

(c) Disposition. Leave to intervene will be freely granted but only insofar as such leave raises matters which are pertinent to and do not unreasonably broaden the issues already presented. If leave is granted, the movant shall thereby become a party with the full status of the original parties to the proceedings. If leave is denied, the movant may request that the ruling be certified to the Environmental Appeals Board, pursuant to § 164.100 for a speedy appeal.
* * * *

40 C.F.R. § 164.31.

NPC's Motion appears to meet the criteria of this Rule. Therefore, for good cause shown, NPC's Motion to Intervene is hereby **GRANTED** and henceforth NPC shall be a party with full status to this proceeding. The Letter dated August 29, 2007 from NPC to the Office of the Hearing Clerk, accompanying the Motion to Intervene, is hereby accepted for filing on this date as NPC's Response to the Notice of Hearing.

Susan L. Biro
Chief Administrative Law Judge

Dated: September 18, 2007
Washington, D.C.

⁹ A Certificate of Service attached to the Motion indicated it was served upon the Agency and NRDC, but not upon the EBDC Task Force, which is the applicant "automatically" a party to this proceeding according to the Federal Register Notice, which has the burden of proof under 40 C.F.R. § 164.132(a), and which filed its Notice of Appearance on August 24, 2007. Such lack of service would appear to violate 40 C.F.R. § 164.5(a) requiring that all parties be served with pleadings. However, since NPC is represented by the same law firm as the EBDC Task Force, and the NPC supports the EBDC Task Force's position in this matter, the lack of such service does not warrant delaying a ruling to give EBDC Task Force an opportunity to respond.