

**DECISION OF THE BOARD OF APPEAL  
OF THE EUROPEAN CHEMICALS AGENCY**

**19 January 2017**

**Application to intervene**

*(Member State whose competent authority has carried out the substance evaluation)*

<b>Case number</b>	A-006-2016
<b>Language of the case</b>	English
<b>Appellants</b>	SI Group-UK Ltd, United Kingdom TÜV SÜD Iberia S.A.U., Spain Sasol Germany GmbH, Germany Nalco Limited, United Kingdom Oy Nizhex Scandinavia Ltd, Finland Addivant UK Ltd, United Kingdom MHM Holding GmbH, Germany PCC Synteza SA, Poland ICC Industries BV, The Netherlands Hermes Chemicals Marketing BV, The Netherlands GE Water & Process Technologies bvba, Belgium GE Water & Process Technologies France S.A.S., France
<b>Representative</b>	Marcus Navin-Jones Keller and Heckman LLP, Belgium
<b>Contested Decision</b>	Decision of 29 April 2016 on substance evaluation for phenol, 4-nonyl-, branched, adopted by the European Chemicals Agency (the 'Agency') pursuant to Article 46 of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ L 396, 30.12.2006, p. 1; corrected by OJ L 136, 29.5.2007, p. 3; the 'REACH Regulation')
<b>Applicant to intervene</b>	The Health and Safety Executive, United Kingdom

**THE BOARD OF APPEAL**

composed of Mercedes Ortuño (Chairman), Andrew Fasey (Technically Qualified Member and Rapporteur) and Sari Haukka (Legally Qualified Member)

Registrar: Alen Močilnikar

gives the following

## Decision

### Summary of the facts

1. The Appellants filed the appeal on 28 July 2016. The appeal concerns a substance evaluation decision adopted by the Agency under Article 46(1) of Regulation (EC) No 1907/2006 of the European Parliament and of the Council concerning the Registration, Evaluation, Authorisation and Restriction of Chemicals (OJ L 396, 30.12.2006, p. 1; corrected by OJ L 136, 29.5.2007, p. 3; hereinafter the 'REACH Regulation')
2. The Appellants request the Board of Appeal to annul those parts of the Contested Decision requiring the submission of further information concerning the environmental exposure assessment and predicted no-effect concentrations. The Appellants also request the Board of Appeal to annul the Contested Decision '*in full or in part*' and take '*any other further measures as justice may require*'. Moreover, the Appellants seek reimbursement of the costs incurred by them in the proceedings and the refund of the appeal fee.
3. On 5 October 2016, an announcement of the appeal was published in accordance with Article 6(6) of Commission Regulation (EC) No 771/2008 of 1 August 2008 laying down the rules of organisation and procedure of the Board of Appeal of the European Chemicals Agency (OJ L 206, 2.8.2008, p. 5), as amended by Commission Implementing Regulation (EU) 2016/823 of 25 May 2016 (OJ L 137, 26.5.2016, p. 4; hereinafter the 'Rules of Procedure').
4. On 14 October 2016, the Health and Safety Executive applied for leave to intervene in the appeal proceedings in support of the Agency.
5. The Appellants and the Agency submitted observations on the application for leave to intervene on 18 and 21 November 2016 respectively. The Appellants object to the application, whereas the Agency supports it.

### Reasons

6. The Appellants claim that the Health and Safety Executive has not fulfilled the conditions to be allowed to intervene. They argue that, in accordance with the second subparagraph of Article 8(1) of the Rules of Procedure, only the Member State whose competent authority has carried out the substance evaluation is exempted from having to establish an interest in the outcome of the case. According to the Appellants, the Health and Safety Executive is not a Member State, namely in this case the United Kingdom of Great Britain and Northern Ireland (hereinafter the 'United Kingdom'), and must consequently establish an interest in the outcome of the case. As it has failed to establish such an interest, the application should be dismissed.
7. The Appellants further argue that they '*understand that the Health and Safety Executive wishes to appoint the Environment Agency as its representative*', but that the former has not provided an authority for the latter to act, as required by Article 9 of the Rules of Procedure.
8. In addition, the Appellants argue that the Health and Safety Executive has not carried out '*the relevant parts*' of the substance evaluation itself, that work having been performed by the Environment Agency. The Appellants assert that no evidence has been provided that the Health and Safety Executive has appointed the Environment Agency to act on its behalf.
9. Article 8(1) of the Rules of Procedure provides that '*[a]ny person establishing an interest in the result of the case submitted to the Board of Appeal may intervene in the proceedings before the Board of Appeal. [...] By derogation to the first paragraph, in*

*cases relating to [substance evaluation], the Member State whose competent authority has carried out the substance evaluation may intervene without having to establish an interest in the result of the case.'*

10. The Board of Appeal observes that the Rules of Procedure are an implementing regulation adopted by the European Commission under Article 132 of the REACH Regulation (all references to Articles or Recitals hereinafter concern the REACH Regulation unless stated otherwise). According to the case-law, an implementing regulation must be given an interpretation consistent with the provisions of the basic regulation (see Case T-481/11, *Spain v Commission*, EU:T:2014:945, paragraph 84). The Rules of Procedure must therefore be considered in light of the REACH Regulation.
11. The second subparagraph of Article 8(1) of the Rules of Procedure refers to '*the Member State whose competent authority has carried out the substance evaluation*'. It is consequently the United Kingdom which may intervene in these appeal proceedings without establishing an interest in the outcome of the case.
12. The Board of Appeal finds that the Health and Safety Executive is entitled to represent the United Kingdom for the purpose of intervening in the present appeal for the following reasons.
13. First, as is evident from the Parties' submissions in this case, the Health and Safety Executive has been appointed by the United Kingdom as a competent authority in accordance with Article 121. This is borne out by the fact that the Health and Safety Executive is specifically listed as the REACH Competent Authority of the United Kingdom on the Agency's website. In the Community Rolling Action Plan ('CoRAP') entry for the Substance on the Agency's website the evaluating Member State is listed as the United Kingdom and the evaluating Member State contact details are listed as '*UK REACH CA Health and Safety Executive*'. The Contested Decision also states that it was adopted '*[b]ased on an evaluation by the Health and Safety Executive as Competent Authority of the United Kingdom*'.
14. Second, according to Article 45, the tasks allotted to competent authorities include the evaluation of substances. In particular, the outcome of an appeal against a substance evaluation decision determines which information will finally be available to the evaluating Member State competent authority and to the Agency. An appeal against a substance evaluation decision is therefore part of the substance evaluation process, and intervening in the proceedings is consequently part of the tasks allotted to competent authorities under Article 45.
15. It must therefore be presumed, in light of Articles 45 and 121, that the Health and Safety Executive represents the United Kingdom for the purpose of intervening in appeal proceedings concerning substance evaluation decisions.
16. The United Kingdom is, moreover, the Member State whose competent authority has carried out the substance evaluation in the present case. As a consequence, the Health and Safety Executive, representing the United Kingdom, may intervene in these proceedings without having to establish an interest in the outcome of the case.
17. Third, the Appellants' argument that the Health and Safety Executive has appointed the Environment Agency to intervene on its behalf, but has not provided an authority for the latter to act, must be rejected. The cover letter attached to the application to intervene states that the Environment Agency is the appointed representative of the Health and Safety Executive. However, the application itself is signed by an official of the Health and Safety Executive, not of the Environment Agency.
18. Fourth, it is necessary to reject the Appellants' argument concerning whether the Health and Safety Executive has itself carried out '*the relevant parts*' of the evaluation. This argument pertains to whether the Health and Safety Executive has succeeded in

establishing an interest in the outcome of the case. As the Health and Safety Executive is not required to establish such an interest in order to be granted leave to intervene, this argument is irrelevant.

19. In light of the foregoing, the Board of Appeal considers that the application to intervene fulfils the requirements of the second subparagraph of Article 8(1) of the Rules of Procedure. As it also fulfils the remaining requirements under Article 8 of those Rules, the application to intervene must be allowed.

On those grounds,

THE BOARD OF APPEAL

hereby:

- 1. Admits the application to intervene by the Health and Safety Executive in Case A-006-2016 in support of the Agency.**
- 2. Instructs the Registrar to arrange for copies of the non-confidential versions of the Notice of Appeal and the Defence to be served on the Intervener.**
- 3. Allows the Intervener a period of one month, following the serving of the Notice of Appeal and the Defence, to lodge a statement in intervention.**
- 4. Other procedural documents lodged in the present case will be served on the Intervener in due course.**

Mercedes Ortuño  
Chairman of the Board of Appeal

Alen Močilnikar  
Registrar of the Board of Appeal