9/20/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
ICI AMERICAS, INC.	)	**I.F.& R. Docket No. VII-1191C-92P**
and	)	
DODGE CITY COOPERATIVE	)	
EXCHANGE,	)	
	)	
Respondents	)	

ORDER DISMISSING COMPLAINT

On November 16, 1993, the undersigned Administrative Law Judge (ALJ) issued an order granting a partial accelerated decision in complainant's favor on the issue of liability and denied respondent's motion for likewise relief. For reasons enunciated in the order, ICI (respondent or ICI), the registrant-manufacturer of the pesticide, was held liable for the pesticide's adulteration and misbranding found at the point of sale of Dodge City, the distributor who repackaged the pesticide. In an order issued February 9, 1994[1], the ALJ granted respondent's motion to have the November 16, 1993, order certified for interlocutory appeal pursuant to 40 C.F.R. §22.29(b). The ALJ issued his certification for interlocutory appeal on March 1.

On March 9, the Environmental Appeals Board (EAB) issued an order accepting the certification of ruling for interlocutory appeal. Thereafter, respondent filed a motion to stay the interlocutory appeal based upon newly discovered evidence, which

[1] Unless otherwise indicated all dates are for the year 1994.

suggested the pesticide was not adulterated or misbranded. In light of this new evidence, the EAB issued an order on May 20, granting a stay of the proceeding and ordered the parties to show cause why this matter should not be remanded. On May 25, the parties filed a joint motion for reconsideration of the ALJ's November 16, 1993 order. The EAB, in an order issued June 7, remanded this matter to the ALJ, since the interlocutory appeal was no longer appropriate. On July 6, the ALJ instructed the parties to serve briefs by August 16 in support of their respective positions on the motion for reconsideration. After an order granted the parties an extension until August 26, these submissions (hereinafter "motions") were made. On September 12, complainant offered a response to respondent's motion. Respondent proffered a voluntary response on September 12.

These are the facts as understood from the parties' briefs: The complaint was based upon the allegation that the composition of the pesticide, Sutan+6.7E, did not conform with its Confidential Statement of Formula (CSF) submitted in support of its registration. Respondent's CSF for Sutan+6.7E that the Environmental Protection Agency (EPA) had on file listed Technical Sutan (sometimes referred to as "Sutan Technical" in the pleadings) as the active ingredient with impurities. However, this CSF stated that Technical Sutan was an unregistered ingredient and did not specifically identify any of the impurities. Therefore, the exact nature of the deviation from the CSF was that the pesticide was found to contain an unidentified impurity (or contaminant)

associated with the active ingredient. This contaminant was identified as s-ethyl dipropylthiocarbamate (EPTC). Consequently, EPA concluded that the pesticide was misbranded and adulterated, since neither the CSF on file nor the label listed the presence of this impurity associated with the active ingredient. In its answer to the complaint, respondent did not deny that the pesticide was contaminated but rather, denied its liability for the contamination.

Sometime around March, respondent learned that EPA had dismissed a complaint where an alleged contaminant was actually an approved registered ingredient of the registered pesticide. (Resp't Mot. at 2.) From this dismissal, respondent seemingly discovered that the allegation in the complaint, that EPTC was an active ingredient, was meant to assert EPTC was not approved in the product registration. (Resp't Mot. at 9.) Respondent had assumed, to its detriment, that complainant cross-checked the alleged contaminant in the complaint with all the ingredients listed on the CSF for Sutan+6.7E. Apparently, unbeknownst to complainant, Technical Sutan became a registered ingredient of Sutan+6.7E in 1990. (See, Resp't Mot., App. A, Aff. of Wayne R. Hillebrecht.) Under the CSF for Technical Sutan, it listed (EPTC) as an impurity. (Id.) However, the CSF for Sutan+6.7E was not amended to reflect the registration of Technical Sutan.

Respondent then notified EPA that the alleged contaminant was in fact a registered ingredient in the pesticide. After reviewing respondent's documents as well as its own, EPA learned that EPTC

was listed on the CSF for Technical Sutan as an impurity, and thus, was a registered ingredient for Sutan+6.7E.

Complainant concedes that the EPTC is a registered ingredient for Sutan+6.7E. (Complainant's Mot. at 3.) Nonetheless, complainant argues that this newly discovered evidence should not be allowed as a basis to reconsider the issue of liability. Its primary objection resides in respondent sleeping on its rights. Respondent's slumber is all the more culpable because it had this evidence in its possession from the incipiency of this action but failed to amend the CSF for Sutan+6.7E as required. See, 40 C.F.R. §152.44; §158.155(d); §158.160(b) and §158.167(a). But for the error in the CSF for Sutan+6.7E, complainant argues, "it would have been able to investigate a complete listing of the impurities associated with this pesticide product." (Complainant's Mot. at 7.) On the other hand, if respondent did not correct the CSF, then it should have raised this issue as an affirmative defense to EPA's allegation of contamination. As a consequence, complainant contends respondent has waived this affirmative defense by not raising it in a timely manner and should be denied its motion for dismissal.

Since this partial accelerated decision never became a final order, 40 C.F.R. §22.32, regarding motions to reconsider, or 40 C.F.R. §22.28, addressing motions to reopen a hearing, of the Consolidated Rules of Practice (Rules), do not directly govern the issue presented. Nevertheless, the standards of review for such

motions provide guidance in that they both pertain to new evidence after a decision has been reached.

Complainant equates this situation to a motion to reopen a hearing since respondent seeks to examine anew the partial accelerated decision with its new evidence on EPTC being a registered ingredient. Under the standard of review in §22.28(a), complainant argues that respondent has failed to show good cause why the evidence respondent now proposes to offer was not produced earlier. Respondent was in possession of such evidence all along but still maintained that no genuine issue of material fact existed. (Complainant's Mot. at 10.) For further support, complainant cites In re Boliden Metech, Inc., (Boliden) Docket No. TSCA-I-1098 [sic] (Order, November 15, 1989) at 8, aff'd, TSCA Appeal No. 89-3 (Order, CJO, November 21, 1990), for the proposition that decisions should not be reopened when evidence available to the moving party was not presented.

Boliden is readily distinguishable from this matter. In that case, the new evidence was offered after the initial decision had been rendered, and on the very last day permitted by the Rules. Yet, the respondent had the "new" evidence in its possession approximately six months prior to service of the initial decision. Boliden at 8. At present, this proceeding has not even reached the hearing stage on the penalty question. While respondent may have been derelict in not discovering and bringing forth this evidence much sooner, this matter has not progressed to the point of no return. Nevertheless, complainant insists on maintaining this

action when it admits there no longer exists an underlying basis for liability. It shows a startling suspension of common sense to continue to engage in an arid exercise.

The other cases from which Boliden derived its rationale also are different from this matter. The primary case, In re N.O.C., Inc., t/a Noble Oil Company, Docket No. II-TSCA-PCB-81-0105, (Order, May 16, 1983), denied a motion to reopen mainly because the evidence proffered was cumulative, and even if it were admitted, the evidence was unlikely to change the result. See, N.O.C. at 26-28. In this case, neither of these factors apply. The new evidence on the CSF for Sutan+6.7E clearly eliminates the basis for the complaint. Administrative agencies have an inherent authority to reconsider their decisions within a reasonably short time period after being rendered. In re Cypress Aviation, Inc., RCRA (3008) Appeal No. 91-6 (Order, EAB, November 17, 1992) at 3. Moreover, such reconsideration is appropriate to review newly discovered evidence that is likely to affect the outcome. See, In re City of Detroit, TSCA Appeal No. 89-5, (Order, CJO, July 9, 1991) at 4. Accordingly, after considering the new evidence, on Sutan+6.7E's CSF, a halt to this proceeding is warranted.

IT IS ORDERED that:

1. The ALJ's order of November 16, 1993 be **WITHDRAWN**.

2. Complainant's motion seeking rejection of the newly offered evidence be **DENIED**.

3. Respondent's motion requesting a dismissal of the subject proceeding be **GRANTED**; and

4. This matter be removed from the docket of the Office of Administrative Law Judges.

Frank W. Vanderheyden
Administrative Law Judge

Dated: September 20, 1994

IN THE MATTER OF ICI AMERICAS, INC. AND DODGE CITY COOPERATIVE EXCHANGE, Respondents,
I.F.&.R Docket No. VII-1191C-92P

Certificate of Service

I certify that the foregoing Order, dated 9/20/94, was sent this day in the following manner to the below addressees:

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Dated: Sept. 20, 1994