UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

WASHINGTON, D.C. 20460

March 14, 1988

A-110

OFFICE OF
THE ADMINISTRATOR

(SEE LIST OF ADDRESSEES ATTACHED)

Subject: Cedar Chemical Company, et al.
FIFRA Docket No. 590, et al.

To the Parties:

Attached hereto is a copy of "Accelerated Decision" and "Cancellation Order" filed March 11, 1988 in the above entitled proceedings by Administrative Law Judge J.F. Greene.

Sincerely,

Maria A. Whiting
Office of Hearing Clerk

Enclosure

cc: Ronald L. McCallum

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

88 MAR 11 P4: 21

In the Matter of	)	
	)	
CEDAR CHEMICAL COMPANY, et al	)	FIFRA DOCKET NO. 590, et al
	)	
	)	
	)	
Petitioners	)	
	)	
	)	

Appearances:

Timothy D. Backstrom, Esquire, Office of General Counsel, U. S. Environmental Protection Agency, Headquarters, 401 M Street S.W. Washington, D.C., for the respondent.

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B. Michael Hodge, Esquire, Collier, Shannon, Rill & Scott, 1055 Thomas Jefferson Street, N.W., Washington, D.C., for petitioner American Frozen Food Institute.

Before J. F. Greene

March 1, 1988

ACCELERATED DECISION

Respondent Environmental Protection Agency (EPA) and petitoners Cedar Chemical Corporation and Drexel Chemical Company have jointly moved, pursuant to 40 CFR §164.91, for entry of an accelerated decision in favor of respondent EPA and for a cancellation order in the form attached to the motion. Respondent has entered into a "stipulation and settlement" with each of these petitioners which provides, among other things, for the sale and distribution of existing stocks of dinoseb products for use on dry peas, lentils, chick peas, and green peas in the States of Washington, Idaho, and Oregon for the 1988 use season, and on caneberries in the States of Washington and Oregon during the 1988-1989 use seasons. Petitioners Cedar and Drexel have declared that, if a final cancellation order is entered in the form proposed, they will not seek or defend continued registration for the dinoseb products in question in this proceeding.

Objections to the settlement have been filed by the American Frozen Food Institute (AFFI), principally on the ground that EPA's October 14, 1986 (51 Federal Register 36634) decision to suspend dinoseb registrations was held to be arbitrary and capricious in Love v. Thomas, No. 87-3866 (9th Cir. 1988), i. e. without sufficient consideration of the economic impact of such a decision upon particular users. By inference, therefore, according to AFFI, the decision to cancel was likewise arbitrary and capricious. AFFI seeks to have a full hearing held on the matter of whether the registrations should be cancelled, despite the settlement agreement between EPA and the remaining registrants in the proceeding. Accordingly, whether non-registrants may compel a hearing to go forward despite a settlement is the principal issue raised by the joint motion.

The Federal Insecticide, Fungicide and Rodenticide Act, 7 USC §136 et seq. does not specifically address the matter of whether non-registrants may compel the continuation of a cancellation hearing when the remaining registrants who were parties to the hearing have settled with EPA. In the only decision on the matter, it was held that non-registrants cannot compel a hearing after the EPA has settled with the registrant, McGill v. EPA, 593 F. 2d 631 (5th Circuit, 1979). The reasoning of the court is compelling:

> Without confidence that, when we undertake in effect to act legislatively, we have Congressional wisdom, and with complete awareness that a reasonable and plausible argument can be made for either course, we decide that the rights of non-registrants are limited to those expressly granted in the statute . . . . (A)lthough Congress granted certain rights to non-registrants that are not often found in analogous statutes, it appears to have intended that users act with the consent of registrants or with respect to a commodity actually being produced for some purposes. In any case, the lengthy hearing now suspended may require only a relatively brief time to complete and the registrant may sit idly by without further expense, but if the users' position is correct, then any consumer might have cause a lengthy and expensive hearing purely on its own volition, even if the registrant and the EPA had reached a settlement agreement the day after the notice was issued. It is difficult for us to conclude that Congress intended sub silentio to tax the fisc with this kind of expense. 593 F. 2d at 637.

The decision further relies upon decisions which examined the extent to which administrative agencies have discretion to suspend an incomplete hearing whose purpose had ended, citing Wisconsin v. FPC, 373 US 294, 311, 83 S. Ct. 1266 (1963), at p. 1275 that "this is not a case in which the [Agency] has walked right up to the line and then refused to cross it -- a case. . . in which all the evidence necessary to a determination had been received but the determination had not been made."

Congress has chosen to provide a hearing on suspension and/or cancellation of registrations to nonregistrants under certain circumstances. It has not provided an absolute right to a hearing in every instance of cancellation or suspension. Non-registrants, for instance, are excluded from emergency expedited hearings, 7 USC §136d(c)(3). They are not specifically notified when the EPA Administrator issues a notice of intent to cancel, §136d(b), as registrants are, although, following a public notice, they may request a hearing. For certain other purposes, they may not act without the agreement of the registrants, 7 USC §136d(a). This last example, where non-registrants must have the concurrence of the registrant in order to request continuance of a registration, is of interest here: the logical extension of an ability to compel a hearing on a registration regarding which the registrant has settled with the EPA is, if the non-registrant's position is upheld, continued registration. Therefore, at the point where the statute comes closest to addressing the result desired by AFFI -- ability to compel a hearing (and presumably continued registrations) -- concurrence of the registrant is required by the statute. To reach any other result (particularly one that will require the expenditure of vast amounts of time and resources) based upon the argument that the original suspension order was not sufficiently well considered, is not justified by what little guidance is provided in the statute on the right to a hearing for non-registrants under these circumstances. And it is not persuasive that the statute permits users to object to a cancellation notice and request a hearing. In view of Congress's clear intent to pick and choose what it would permit non-registrants to do in connection with the registrations of others, and what obligations EPA would have toward non-registrants [e. g. notification only through public notice), 7 USC §136d(a), §136d(c)(3)], it is not reasonable to conclude that the ability

to request a hearing means that Congress also intended to provide non-registrants with the ability to compel other litigants to go forward after they have reached a settlement. If the instant situation had been addressed, Congress might well have chosen to follow the lead it provided at 7 USC §136d(a), and deny non-registrants the ability to compel a hearing where the registrants have settled questions relating to their registrations.

In view of these petitioners' determinations not to seek or defend further registration of their dinoseb products, respondent EPA is entitled to a cancellation order relating to such products.

Regarding the proposed limited disposition of existing stocks of cancelled dinoseb products, the Administrator has broad discretion to permit sale, distribution, and use under such terms as he considers reasonable and appropriate, 7 USC §136d(a)(1), taking account of relevant factors, and provided that such sale and use are not inconsistent with relevant portions of the statute and will not have unreasonable adverse effects upon the environment. The use provisions of the proposed order clearly rely heavily upon the record and provisions of the decision in FIFRA Docket No. 612, the expedited proceeding held pursuant to 40 CFR §164.130, Subpart D, which provided for the modification of the final suspension order for dinoseb to permit emergency exemptions for the 1987 growing season. These provisions are reasonable and carefully considered. 1/ Further, "distribution, sale, and use of dinoseb stocks will be

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1/ The restrictions in the proposed cancellation order do not contain the "gender-based" prohibitions of the Administrator's decision in the Subpart D proceeding, FIFRA Docket 612. The Administrative Law Judge had declined to recommend such restrictions in her earlier decision. See Rationale, p. 19, attached to the joint motion.

authorized only for a particular crop in a particular State if the State Department of Agriculture expressly requests such authorization and agrees to enforce the restrictions set forth in the order. Based upon prior experience, EPA believes that this mechanism will significantly enhance the prospects that dealers and users will comply with the restrictions set forth in the cancellation order." See p. 17 of the Rationale attached to the joint motion as Attachment C.

Provisions for indemnification and disposal included in the proposed order are likewise reasonable and appropriate, in view of the facts and circumstances recited in the Rationale attached to the parties' joint motion.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent EPA and petitioners Cedar Chemical Corporation and Drexel Chemical Company havve entered into a "stipulation and settlement," which provides for, among other things, the sale, distribution and use of existing stocks of dinoseb products on dry peas, lentils, chick peas, and green peas in the States of Washington, Idaho, and Oregon for the 1988 use season, and on caneberries in the States of Washington and Oregon during the 1988-1989 use seasons.

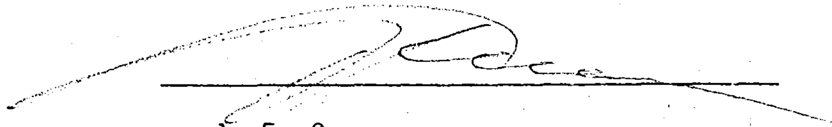
2. Petitioners Drexel and Cedar have declared that they will not seek or defend continued registration for dinoseb products in question in this proceeding, if a final cancellation order in the form proposed (and attached hereto) issues.

3. Respondent EPA is entitled to an accellerated decision in its favor in this matter.

4. Non-registrants who object to the settlement on the ground that the original suspension and cancellation orders were not sufficiently well considered may not compel a hearing to go forward despite the settlement described above.

5. The provisions of the proposed distribution, sale, and use of existing dinoseb stocks are reasonable and appropriate.

6. The provisions for indemnification and disposal included in the order are reasonable and appropriate.



J. F. Greene
Administrative Law Judge

Dated: 3-1-88
Washington, D.C.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

88 MAR 11 P4:21

In the Matter of	)	
	)	
Cedar Chemical Company, et al.	)	FIFRA Docket Nos. 590, et al.
	)	

CANCELLATION ORDER

Pursuant to FIFRA section 6(b), 7 U.S.C. §136d(b), and 40 C.F.R. §164.91 and 164.103, all registrations are cancelled for pesticide products containing dinoseb (2-sec-butyl-4,6-dinitrophenol) or any of its salts which have not already been cancelled pursuant to the Notice of Intent to cancel which was issued by the Administrator on October 7, 1986, and which was published at 51 FR 36650, October 14, 1986. Except as provided below, it shall be unlawful under FIFRA sections 12(a)(1)(A) and 12(a)(2)(K), 7 U.S.C. §§136j(a)(1)(A) and (a)(2)(K), for any person in any State to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver to any person any pesticide product containing dinoseb or any of its salts.

Pursuant to FIFRA section 6(a)(1), 7 U.S.C. §136d(a)(1) the distribution, sale, and use of stocks of cancelled dinoseb products will be permitted for: (1) for weed control in dry peas, lentils, chickpeas, and green peas in the States of Washington, Idaho, and Oregon during the 1988 use season, and (2) for vegetative cane control in caneberries (blackberries, boysenberries, loganberries, and raspberries) in the States of Washington and Oregon during the 1988 and 1989 use seasons. Such distribution, sale, and use will only be permitted in accordance with the following procedures, terms and conditions.

No cancelled dinoseb product shall be distributed, sold, or used for any crop in any State without express written authorization from the Assistant Administrator for Pesticides and Toxic Substances (or his delegate). The Assistant Administrator shall authorize distribution, sale, and use of existing stocks of dinoseb products for a particular crop in a particular State only if the State Department of Agriculture expressly requests in writing that such distribution, sale, and use be permitted, and agrees to accept and enforce all procedures, terms, and conditions set forth in, or adopted pursuant to, this Order.

The following mandatory use restrictions shall be observed by all persons using any cancelled dinoseb product pursuant to this Order, shall constitute supplemental labeling for all cancelled dinoseb products which may be used pursuant to this Order, and shall take precedence over any inconsistent restrictions or provisions on the prior labeling for such products:

(1) Dinoseb shall not be applied at an application rate exceeding three pounds of active ingredient (a.i.) per acre for dry peas, chickpeas, and green peas, one and one-half pound a.i. per acre for lentils, and two and one-half pounds a.i. per acre for caneberries.

(2) Dinoseb shall not be applied by any one individual on any single day to more than a total of eighty (80) acres of dry peas, lentils, chickpeas, and green peas, or to more than twenty (20) acres of caneberries.

(3) No individual shall mix and/or load in one day more than the quantity of dinoseb required to treat the maximum permissible daily acreage for one crop at the maximum permissible application rate.

(4) Only certified applicators may mix, load, or apply dinoseb; other persons, even if they are operating under the direct supervision of a certified applicator, shall not mix, load, or apply dinoseb.

(5) All mixing and loading of dinoseb products must be done utilizing a closed system.

(6) All persons must wear chemically resistant disposable coveralls and chemically resistant gloves and boots during mixing and loading of dinoseb, while adjusting or repairing dinoseb application equipment, and during application of dinoseb to caneberries.

(7) Closed tractor cabs equipped with positive pressure ventilation must be used for application of dinoseb to dry peas, lentils, chickpeas, and green peas. Applicators must remove protective coveralls and gloves worn during mixing and loading immediately before entering a closed tractor cab in order to avoid cab contamination, and must carry an unused set of coveralls and gloves in the cab, for use in the event in-field repair, maintenance, or adjustment of equipment is required.

(8) Aerial application of dinoseb is prohibited. Dinoseb may only be applied utilizing tractor drawn equipment.

(9) Dinoseb may only be applied to caneberries as a low-pressure directed spray for vegetative cane (primocane) control.

(10) Application of dinoseb is prohibited when wind conditions exceed ten miles per hour.

(11) No person shall re-enter any field treated with dinoseb for any purpose within one week of application unless that person is within a closed cab, or is wearing chemically resistant disposable coveralls and chemically resistant gloves and boots. Any person required to re-enter a field treated with dinoseb within one week of application shall be notified that the field was treated with dinoseb and advised to avoid dermal contact with treated foliage and soil.

The following mandatory restrictions shall govern any distribution or sale of cancelled dinoseb products pursuant to this Order:

(1) No cancelled dinoseb product may be distributed or sold for use on any crop unless: (1) the product was registered, packaged, and labeled on October 7, 1986, or (2) the

product was manufactured from stocks of a registered technical dinoseb product which were packaged and labeled, and in the possession of the manufacturer, on or before October 7, 1986.

(2) No cancelled dinoseb product may be distributed or sold for use on dry peas, lentils, chickpeas, or green peas unless the product was previously labeled for use on peas, lentils, or chickpeas. No cancelled dinoseb product may be distributed or sold for use on caneberries (blackberries, boysenberries, loganberries, and raspberries) unless the product was previously labeled for use on one or more of these crops.

(3) Only pesticide dealers licensed by the State in question may distribute or sell cancelled dinoseb products.

(4) Each container of a cancelled dinoseb product which is distributed or sold must be accompanied by supplemental labeling including all of the use restrictions set forth above, and a warning stating (1) that the product poses a hazard to unborn children and that all reasonable efforts should be made to prevent exposure of women of child-bearing age, (2) that the product also poses hazards to male reproduction, (3) that the product is acutely toxic, and (4) that the product may only be applied by certified applicators.

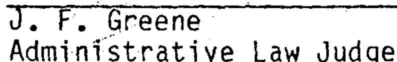
(5) Dealers may sell dinoseb only to growers who may legally use the product pursuant to this Order, and no grower shall be permitted to purchase a quantity greater than that required to treat the grower's eligible crop acreage at the maximum permissible application rate. All stocks of dinoseb already in a grower's possession must be taken into account when determining the quantity of dinoseb a grower may lawfully purchase.

(6) Dealers must obtain and record the following information prior to selling, distributing, or delivering any dinoseb product:

   (a) The grower's name, address, and certification number (if any),
   (b) The type of crop and number of acres to be treated,
   (c) The name, address, and certification number of the person(s) who will mix, load, and apply the dinoseb,
   (c) The quantity of dinoseb already in the grower's possession,
   (d) The product name(s) and registration number(s) of the dinoseb product(s),
   (e) The quantity of the dinoseb product(s) to be sold, distributed, or delivered.

All such information shall be forwarded by the dealer to the State Department of Agriculture and the EPA regional office within five days following sale, distribution, or delivery.

The Assistant Administrator for Pesticides and Toxic Substances, in consultation with the Regional Administrator and the Departments of Agriculture of the States of Washington, Oregon, and Idaho, shall establish procedures for monitoring and enforcement by the States of the restrictions on sale, distribution, and use imposed pursuant to this Order. The Assistant Administrator (or his delegate) may also authorize (1) sale, distribution, or shipment or existing stocks by the recipient dealer is permitted pursuant to this Order, and (2) any shipments of any cancelled dinoseb product which was are necessary to facilitate proper storage or disposal of such products. This Order constitutes final Agency action in the above-captioned proceeding under FIFRA sections 6(b) and 16(b), 7 U.S.C. §§136d(b) and 136n(b), and is a final cancellation order under 40 C.F.R. §164.130



J. F. Greene
Administrative Law Judge

Dated: 3-11-88
Washington, D.C.