BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

In re:	
E.I. du Pont de Nemours and Company	FIFRA Appeal No. 98-2
Docket No. FIFRA-95-H-02.	

ORDER DENYING MOTION FOR RECONSIDERATION OF DECISION AND REMAND ORDER

Appellant E.I. Du Pont De Nemours and Company ("DuPont") has moved for reconsideration of the Board's Decision and Remand Order, dated April 3, 2000 (the "Order"). *See* Motion for Reconsideration of Decision and Remand Order ("Motion"). DuPont requests that "the Board revise its Order by rescinding the remand of the %label inconsistency& issue to the Presiding Officer." Motion at 1. By referring to the remand of the "label inconsistency" issue, DuPont refers to our statement that:

> In addition, on remand, the Presiding Officer may consider, as part of the question of the evidence bearing upon the labels' alleged compliance with the WPS-labeling standards, whether the labels at issue in this case show a facial non-compliance with the language requirements of the WPS regulations in that the labels contain an internal inconsistency.

Order at 41. DuPont argues that reconsideration is appropriate on the grounds, first, that the Board allegedly "does not have

the authority to remand issues that were never raised in the underlying proceedings," and second, that the label inconsistency issue allegedly cannot state an actionable claim for misbranding. Motion at 1. DuPont cites 40 C.F.R. § 22.30 in support of its contention that the Board does not have authority to remand issues that allegedly were not raised by the parties or the Presiding Officer in the underlying proceeding.[1]

The Toxics and Pesticide Enforcement Division, Office of Regulatory Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency ("Pesticide Enforcement") has filed a response to DuPont's Motion. *See* Complainant's Response to Respondent's Motion for Reconsideration of Decision and Order ("Response"). Pesticide Enforcement opposes DuPont's request for reconsideration on three grounds. First, Pesticide Enforcement argues that the factual question of label consistency is not a separate and new issue from the misbranding violation that was alleged in the complaint. Response at 1. Second, Pesticide Enforcement disputes DuPont's statement that the Board has raised an issue that was never the subject of this enforcement action. *Id.* at 1-2. Instead, Pesticide Enforcement contends (a) that label inconsistency is part of the evidence of misbranding and

[1]DuPont restates these same arguments in a reply brief that it filed on May 11, 2000, *see* Reply in Support of Motion for Reconsideration of Decision and Remand Order (May 11, 2000), which we have considered in rendering our decision today.

(b) testimony was adduced at the evidentiary hearing regarding the language that was to appear in both parts of the label and the relationship between them and Pesticide Enforcement discussed the issue of inconsistency in its oral argument. *Id.* Third, Pesticide Enforcement argues that, by highlighting the fact of inconsistency, "the Board did not open the door for DuPont to reargue its case before the Board at this time," but that the parties should have the opportunity to address this issue before the Presiding Officer. *Id.* at 2-3.

Upon consideration, DuPont's Motion is denied. In the case of *In re Hardin County,* RCRA (3008) Appeal No. 92-1, slip op. (Feb. 4, 1993), this Board considered the question of what matters are properly included in a remand. In that case, the movant had argued that the Board's remand order effected an amendment of the Agency's complaint and that the Board did not have such authority under 40 C.F.R. § 22.30. In denying reconsideration, the Board held that the remand order had not amended the complaint, but instead merely directed that factual findings be made on an issue that the Board determined was an unsupported assumption of the presiding officer's ruling (those same factual issues may also have supported a finding of an alternative violation). The Board's remand order had directed that if the facts proved contrary to the presiding officer's assumption, the case "may proceed" as if the presiding officer had not entered the dismissal order that was the subject of the appeal.

In rejecting the motion for reconsideration, the Board held that in allowing the case to proceed in those circumstances, the Board only intended "that the proceedings should pick up where they left off * * * with either party free to pursue whatever legal strategies it deems best." *Hardin County*, slip op. at 6. The Board, in other words, did not dictate any particular outcome on the strategies that the parties might pursue. On the issue of whether the Board's remand authority is limited by 40 C.F.R. § 22.30(c), the Board stated that "[t]his particular procedural rule is but one subsection of a broader set of rules governing Appeals from initial decisions, and its purposes are largely self-evident and straightforward – namely, affording parties a full and fair opportunity to present their views, whether orally or in writing, before any final decision is reached by the Board." *Id.* at 8-9.

In the present case, our conclusions on the merits of DuPont's reconsideration motion are largely the same as our observations in *Hardin County*. In particular, it was not our intention, when we stated that the Presiding Officer "may consider" the inconsistency in the labeling on remand, to foreclose the Presiding Officer from entertaining and ruling upon any motions filed by the parties that might seek to limit the scope of the Presiding Officer's consideration of the inconsistency, or even whether it might or might not be appropriate for the Presiding Officer to consider the

inconsistency. In other words, we intended to state that the Presiding Officer may consider the inconsistency on remand if otherwise appropriate. If the Presiding Officer determines that consideration should not be given to the inconsistency, or determines that consideration should only be given under narrowly defined circumstances, the Presiding Officer will have complied with the terms of the remand, "and whichever party is aggrieved by the ruling will presumably appeal it to the Board, which will rule upon the propriety of the matter at that time." *Hardin County*, slip op. at 7-8. To us, the inconsistency became apparent as a result of the toxicity considerations that underlie each of the two protective labeling requirements, since the regulations require each of the labeling requirements to be based on the pesticide's toxicity. However, we are not seeking to determine in advance how the inconsistency should be considered, if at all.[2]

We do, however, conclude that there is no merit to DuPont's argument that 40 C.F.R. § 22.30 somehow limits this Board's authority to reference in its remand order the issue concerning the language appearing in the two parts of the products' label.

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[2]As further clarification in this regard, we do not intend to preclude the Presiding Officer from determining, in the first instance, (i) whether the labels contain an internal inconsistency, facial or otherwise, in that a protective eyewear warning is used in one part of the label and omitted in another, or (ii) whether the WPS regulations require the same level of eye protection warning in both parts of the label. It suffices for purposes of a remand that we have noted an apparent inconsistency in the labeling and an apparent conflict with the WPS regulations.

Our observation, which DuPont requests be stricken from the Order, was made based upon facts in the administrative record – including the labeling submitted with DuPont's applications for amended registration, CX 6, CX 7, CX 8, CX 9, which DuPont has admitted contain the same WPS language as appeared on the products that were shipped in April 1994. Further, as noted by Pesticide Enforcement, testimony was adduced at the evidentiary hearing regarding the language that was to appear in both parts of the label and the relationship between them, Response at 2-3, and Pesticide Enforcement noted at oral argument before this Board that the labels contained an inconsistency in the language of the two parts of the label. Transcript of Oral Argument (Sept. 29, 1999) at 36. Thus, DuPont's assertion that issues regarding the different language in the two parts of the label were not raised prior to this Board's Order is incorrect.

Moreover, until this Board ordered that DuPont's proffered evidence (which allegedly shows that its products are toxicity category III) should be admitted into the record of this proceeding, the evidence in the record showed that the products are toxicity category II, which is fully consistent with the protective eyewear warning that appears in the Hazards to Humans section of the labeling. Thus, any argument that the labeling is misbranded as a result of the language in the Hazards to Humans section was not available prior to the entry of the Remand Order. DuPont's

contention that such issues may not be considered on remand, in effect, would allow it to both submit evidence into the record for the first time on remand in an effort to demonstrate that one part of the label (the Agricultural Use Requirements box) complies with the WPS regulations and simultaneously preclude the Presiding Officer from considering whether other parts of the label (including the Hazards to Humans section) are not in compliance with the WPS regulations in light of the newly admitted evidence. There is no rule of law or logic that would preclude consideration of such matters based merely on the procedural context that DuPont obtained the admission of its evidence by a ruling of this Board after appeal. Had DuPont successfully obtained the same ruling from the Presiding Officer during the original evidentiary hearing, there would have been nothing to prevent the Presiding Officer from considering, as appropriate, whether the Hazards to Humans section of the labeling was consistent with the WPS regulations. No different result should obtain if the ruling is the result of a remand. Certainly, section 22.30 does not dictate such an absurd result. Indeed, the preamble to the original version of the consolidated rules of practice noted that the grant of remand authority in 40 C.F.R. § 22.30(c) was specifically intended to include "the authority to remand the case to receive evidence relating to issues *new* to the proceeding." 45 Fed. Reg. 24,360, 24,362 (Apr. 9, 1980), quoted in *Hardin County,* slip op. at 9 (emphasis added).

In addition, the objective of section 22.30(c) that, before a final decision is made, all parties should be afforded a full and fair opportunity to present their views, *Hardin County,* slip op. at 8-9, will be satisfied in this case by the opportunity for the parties to present their views to the Presiding Officer with a right to appeal any adverse ruling to this Board. Accordingly, we reject DuPont's contention that 40 C.F.R. § 22.30 bars us from including in our remand the "label inconsistency" issue and related matters for consideration by the Presiding Office if otherwise appropriate.

So ordered.

ENVIRONMENTAL APPEALS BOARD

Date: 5/17/00

By: /s/
Ronald L. McCallum
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Denying Motion for Reconsideration of Decision And Remand Order, in the matter of E.I. du Pont de Nemours and Company, FIFRA Appeal No. 98-2, were sent to the following persons in the manner indicated:

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Dated: 5/17/00

/s/
Annette Duncan
Secretary