

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

American Cyanamid Company,

Claimant,

v.

Thompson-Hayward Chemical
Company,

Respondent

) 77 AUG 1 P 3: 56

) FIFRA COMP. Docket No. 26

ACCELERATED DECISION DISMISSING CLAIM FOR COMPENSATION

FOR TEST DATA SUBMITTED PRIOR TO OCTOBER 21, 1972

This is a proceeding under the amended Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") Section 3(c)(1)(D), 7 U.S.C. 136a(c)(1)(D) (Supp V, 1975), to determine reasonable compensation to be paid by respondent Thompson-Hayward Chemical Company ("Thompson-Hayward") to claimant American Cyanamid Company ("Cyanamid") for test data submitted by Cyanamid in registering a pesticide and relied upon by Thompson-Hayward to register a similar product.

The claim for compensation arises out of the application of Thompson-Hayward to obtain an amended registration for the pesticide DE-FEND-E-267, which is comprised of the active ingredient Dimethoate. Pursuant to the procedures established by the Interim Policy Statement issued by the EPA on November 14, 1973, 38 Fed. Reg. 31862, Cyanamid, by letter dated February 6, 1975, filed a claim for compensation

with respect to data submitted in the registration of the pesticide CYGON 267. Thompson-Hayward acknowledged that it relied upon the Cyanamid data in its registration application and the amended registration was issued on April 29, 1975.

This proceeding to determine reasonable compensation for claims under Section 3(c)(1)(D) of FIFRA has been instituted and the undersigned has been designated to preside pursuant to the authorization and direction of the Acting Administrator, dated October 13, 1976 (41 Fed. Reg. 46020).

On March 15, 1977, I issued a decision denying a motion by Cyanamid to dissolve or stay these proceedings, except to grant a stay until the Director of the EPA's Registration Division had, in accordance with my direction, furnished a statement identifying which of the test data for which Cyanamid claimed compensation in its letter of February 6, 1977, was considered by the EPA in registering Thompson-Hayward's product. That statement was submitted by the Acting Director of the Registration Division on April 21, 1977, and the stay expired according to its terms.

Cyanamid, on July 1, 1977, filed its statement and certification pursuant to Section 2 of the Rules of Procedures issued herein, and a response has been filed by Thompson-Hayward.

The statement received from the Acting Director of the Registration Division discloses that much of the data for which Cyanamid has claimed compensation was submitted prior to October 21, 1972. In the Interim Policy Statement, which set out the EPA's policies and procedures with respect to its consideration of data under Section 3(c)(1)(D) prior to the amendment of FIFRA in 1975 by Pub. L. No. 94-140, 89 Stat. 754,

the EPA took the position that only data submitted on or after October 21, 1972, was subject to Section 3(c)(1)(D). 38 Fed. Reg. This construction of the statute was upheld by the Administrator in Dow Chemical Co. v. Velsicol Chemical Corp., FIFRA COMP. Docket No. 4-18 (filed May 25, 1977).

Relying on the authority of Dow v. Velsicol, supra, and also on the legislative history of Section 3(c)(1)(D), I dismissed a claim for compensation for data submitted prior to October 21, 1972, in a case having the same parties as this case, and involving the registration of a pesticide also containing Dimethoate, American Cyanamid Co. v. Thompson-Hayward Chemical Co., FIFRA COMP. Docket No. 25 (filed July 26, 1977). For the reasons stated in that case, I conclude that Cyanamid's claim for compensation here, so far as it is for data submitted prior to October 21, 1972, must also be dismissed. I find nothing in the papers before me which would indicate that a different result should be reached.

Cyanamid argues that the record is incomplete because it omits documents which Cyanamid alleges would demonstrate that the EPA's position with respect to data submitted prior to October 21, 1972, should not be given efficacy as a contemporaneous construction. Cyanamid further states that these documents are not available to it because they are covered by a protective order in Dow Chemical Co. v. Train, No. 76-10087 (E.D. Mich.), and the rules of procedure issued

herein do not allow independent discovery. From the very sketchy description of the documents furnished by Cyanamid, it appears that they are largely, if not entirely, EPA memoranda, drafts, notes and the like. Cyanamid may have overlooked section 2(g) of the rules of procedure providing that the Administrative Law Judge may in his discretion, direct the Director of the EPA's Registration Division to supply additional information which the Administrative Law Judge deems to be relevant. It is not necessary to decide, however, if any of the agency documents referred to by Cyanamid could be obtained under that rule, for they would not be material in any event. Whether the EPA has construed Section 3(c)(1)(D) properly can be determined from an examination of the statute itself and its legislative history.

Dow Chemical Co. v. Velsicol Chemical Corp., FIFRA COMP. Docket Nos. 4-18 (Order and opinion of ALJ Levinson, filed April 7, 1977); American Cyanamid Co. v. Thompson-Hayward Chemical Co., FIFRA COMP. Docket No. 25 (filed July 26, 1977). No inquiry into the EPA's motives or deliberations, which is what the documents apparently relate to, seems necessary, or even warranted in order to decide the question.

Cyanamid claims that to limit the data subject to compensation under Section 3(c)(1)(D) would deprive it of its property without due process of law. There is no basis for such a claim. See Dow Chemical Co. v. Train, 423 F. Supp 1359, 1364 (E.D. Mich. 1976). I also find that

Thompson-Hayward's admission that it relied on data submitted prior to October 21, 1972, did not estop it from objecting to the payment of compensation for such data. See Cyanamid v. Thompson-Hayward Chemical Co., FIFRA COMP. Docket No. 25, supra.

Finally, Cyanamid argues that the cost of generating data submitted prior to October 21, 1972, must be considered in determining reasonable compensation for data submitted after that date. Whether this is so depends upon the facts. This ruling would not preclude the consideration of costs relating to data submitted prior to October 21, 1972, when the facts establish that such costs are an appropriate element of cost in determining reasonable compensation for data submitted on or after October 21, 1972.

Accordingly, for the reasons stated, I find that Cyanamid is not entitled to compensation under Section 3(c)(1)(D) for test data submitted prior to October 21, 1972, and relied upon by Thompson-Hayward in registering its pesticide. Pursuant to Section 13 of the Rules of Procedure issued herein, I am issuing sua sponte an accelerated decision dismissing Cyanamid's claim for compensation for such data. This dismissal does not apply to claimant's claim for compensation for test data submitted on or after October 21, 1972.

ORDER

Claimant's claim for compensation under Section 3(c)(1)(D) for test data so far as it relates to data submitted prior to October 21, 1972, is hereby dismissed.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

August 1, 1977

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NOTICE OF PREHEARING CONFERENCE

Notice is hereby given that a prehearing conference, as provided for in Section 12 of the rules of procedure issued herein, will be held on Tuesday, August 30, 1977, at 10:30 a.m. in Room 2123, Mall Area, United States Environmental Protection Agency, 401 M Street, S. W., Washington, D. C. The purpose of the conference is to consider matters relating to the determination of reasonable compensation for data submitted on or after October 21, 1972.

Each party shall make available to each other party at the conference the names of the expert and other witnesses he intends to call, together with a brief narrative summary of their expected testimony, and copies of all documents and exhibits which the party intends to introduce into evidence. Copies of these documents shall be furnished at the same time to the Administrative Law Judge.

Gerald Harwood

Gerald Harwood
Administrative Law Judge

August 1, 1977