UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)
	)
KETCHIKAN PULP COMPANY	) Docket No. CWA-1089-12-22-309(g)
	)
Respondent	)

ORDER DENYING RESPONDENT'S MOTION TO REOPEN HEARING

I. The Issue Presented

In the Initial Decision issued herein on November 22, 1995, Ketchikan Pulp Company (KPC or Respondent) was found liable for three violations of Section 301(a) of the Clean Water Act (CWA), 33 U.S.C. § 1311(a), and was assessed a total civil penalty of $23,000. On December 22, 1995, KPC filed a Motion to Reopen Hearing (Motion to Reopen) in the subject proceeding for the purpose of introducing evidence to rebut the finding of liability on the unauthorized discharge of cooking acid, without a National Pollution Discharge Elimination System (NPDES) permit. Complainant served a response in opposition to the KPC request to reopen on January 30, 1996. KPC submitted a reply to Complainant's Response on February 6, 1996. The arguments of the parties regarding reopening the hearing will be set out below in such detail as deemed necessary.

The findings in the Initial Decision rejected Respondent's contentions that its discharge of cooking acid was allowed by its NPDES permit and that it was not a violation since the discharge was covered by the permit as a shield defense set out in Section 402(k) of the CWA, 33 U.S.C. § 1342(k). In this regard, it was determined that the cooking acid discharge was not

specifically disclosed in Respondent's permit application as part of normal effluent discharges nor did the permit implicitly allow this discharge. While the KPC application did list magnesium and sulfite as part of the effluent, it was held that the evidence established cooking acid (magnesium bisulfite) was a different chemical compound. Thus, it was not warranted to combine the two constituents to conclude that KPC sought permission to discharge magnesium bisulfite when characterizing its normal effluent discharges. Moreover, it was also concluded that this discharge, resulting from an inadvertent spill and not from normal plant operations, was not implicitly allowed because it could not have been foreseen and factored into the permit's restrictions. (Initial Decision, pp. 20-31.)

Section 22.28(a) of the EPA Rules of Practice (Rules), 22 C.F.R. § 22.28(a) governs motions to reopen a hearing. This section states:

> (a) *Filing and content.* A motion to reopen a hearing to take further evidence must be made no later than twenty (20) days after service of the initial decision on the parties and shall (1) state the specific grounds upon which relief is sought, (2) state briefly the nature and purpose of the evidence to be adduced, (3) show that such evidence is not cumulative, and (4) show good cause why such evidence was not adduced at the hearing.

The four requirements are in the conjunctive and all must be met before a motion to reopen may be granted. The Motion to Reopen will be decided based on the above criteria set out in Section 22.28(a) of the Rules.[1]

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[1]Under Section 22.28(b) of the Rules, the filing of a motion to reopen stays the running of all time periods until the motion is denied or the reopened hearing is concluded.

II. Respondent's Position

As grounds to reopen, Respondent asks to produce evidence on the chemical relationship between magnesium, sulfite and magnesium bisulfite. This evidence will allegedly show: that cooking liquor consists of magnesium and several forms of sulfite ions that are commonly described as "sulfite"; and that the analytical method for sulfite that EPA requires to be used for preparing NPDES permit applications measures all the various forms of sulfite, including the bisulfite form, and reports them as "sulfite". Therefore, Respondent avers that this evidence will show that these constituents were disclosed in its permit application in accordance with EPA's regulations and prescribed analytical methods. (Motion to Reopen, p.1.)

KPC asserts that the finding in the Initial Decision, p. 24, that magnesium and sulfite are different chemical compounds from magnesium bisulfate (cooking acid) and cannot be combined to conclude that the permit application sought permission to discharge cooking acid, is incorrect and based on evidence solely presented by Complainant. KPC asserts that Complainant's evidence is central to the aforementioned finding that Respondent did not specifically request to discharge cooling acid in its NPDES permit application. (Id. at 3.)

Respondent contends that Complainant provided no notice of this factual issue prior to hearing, as required by Section 554(b)(3) of the Administrative Procedure Act (APA), 5 U.S.C. § 554(b)(3). KPC argues that the first time the constituents of cooking acid arguably became at issue was during cross-motions for accelerated decision, which were filed in August and September 1991. Moreover, the Respondent points out that, in the March 22, 1992 order denying the cross-motions for accelerated decision, the Presiding Judge noted that it was unclear whether there was a dispute regarding the constituents of cooking acid. KPC asserts that, despite

the order's request to clarify factual issues, Complainant never disclosed in any of its prehearing exchange information that it would contend cooking acid does not consist of magnesium and sulfite. As a result, Respondent avers that it could not fully litigate this issue and that due process requires that it be given the opportunity to present the further evidence set out in the Motion to Reopen. (Id at 3-6.)

Respondent in the Motion to Reopen also described in detail the expert testimony it proposes to present, allegedly to correct misleading testimony from the Complainant, namely the testimony that the bisulfite ion was a completely different chemical than the monosulfite ion and the description of the monosulfite ion as the sulfite ion (Tr. 106, 125). According to KPC, bisulfite and monosulfite are merely different ionic forms of the substance measured by the EPA-approved analytical method of sulfite. (Id. at 6-10.).

Respondent also contends that the evidence it seek to present is not cumulative and that it had good cause for not presenting it at the hearing. In this latter regard, KPC asserts that it did not learn until during the hearing that Complainant intended to dispute that a bisulfite ion was not a sulfite, and that it was caught unaware of this contention. Therefore, according to Respondent, it could not present affirmative testimony at hearing to rebut the Complainant's contention because of a lack of prior notice of the contention. KPC also avers that it has just cause for not offering evidence at hearing since Complainant's contention that bisulfite is different from sulfite is contrary to the generally-accepted understanding of the term "sulfite" in the scientific community. (Id. at 12-15.)

III. Complainant's Position

Complainant first points out that Respondent , not it, first put the chemistry of cooking acid into evidence during KPC's cross-examination of Complainant's witness, Mr. Daniel Bodien, and argues that Respondent cannot now claim that its efforts on redirect to rebut that cross-examination, was an ambush. Complainant notes that its argument on the cooking acid spill was much simpler than the sulfite/bisulfite theory asserted by KPC. Complainant avers that its theory of the case has always been that KPC never listed spills of raw cooking acid (magnesium bisulfite) in its permit application and, since spills of raw material are not a normal part of Respondent's effluent, authorization to discharge spilled cooking acid cannot be inferred from the permit's silence on that issue. Complainant sets out that it presented this argument on pages 5-7 in its August 1991 prehearing pleading relating to the motions for accelerated decision and reiterated it in its Post Hearing Brief at pages 13-15. (Complainant's Response to Motion to Reopen, pp. 3, 4.)

Complainant contends that the issue Respondent now says that it was unprepared to address at hearing was first raised during cross-examination of Mr. Bodien, when KPC attempted to introduce for the first time that the different ions of sulfite and bisulfite are chemically indistinct (Tr. 92-98). Complainant asserts that, on redirect examination, it for the first time elicited testimony from Mr. Bodien regarding the chemistry of magnesium bisulfite to rebut KPC's argument (Tr.105-07). Complainant also attempted additional rebuttal through a second witness (Tr. 124-25). As a result, Complainant argues that it is not a denial of due process to offer evidence to rebut an argument made by Respondent during cross-examination at hearing. (Complainant's Response to Motion to Reopen, pp. 4-5.)

Complainant also argues that KPC had adequate notice of this issue prior to hearing as required by Section 554(b) of the APA, 5 U.S.C. § 554(b), since it gave reasonable notice of its claim. In this regard, Complainant mentions that it stated in its August 1991 reply pleading relating to the motions for accelerated decision, at pages 6, 7 that: "Cooking Acid is not a benign mixture of magnesium and sulfite, it is a hazardous chemical with a very low pH that is used to break down wood chips into pulp." (Id. at 6, 7.)

Complainant also argues that Respondent cannot now raise an evidentiary objection that it failed to raise during hearing or in its post hearing briefs, on the reasoning that the failure to object to the testimony promptly constitutes a waiver. Further, Complainant contends that KPC had the opportunity to explore the disputed evidence at hearing and could have challenged Complainant's witnesses on their testimony then. (Id. at 9-11.)

In addition, Complainant takes the position that the new evidence Respondent seeks to introduce is not critical to the Presiding Judge's decision. In this regard, Complainant asserts that, while the chemistry of cooking acid played a role in the decision, it was not the basis for the holding. Complainant urges that the critical holding in the Initial Decision, p. 23, is that, if the discharges can reasonably be considered as part of the operation for which the permit application was made, then grant of the permit would shield the discharges from being illegal. In Complainant's view, this language indicates that the holding turned on the finding that the discharge did not result from normal plant operations as disclosed in the permit application. Complainant then argues that the analysis by the Presiding Judge shows that the discharge was not normal to plant operations, because of the following rationale in the Initial Decision, pp. 29-30 rejecting KPC's argument that the discharge was permitted as part of spills considered a

normal part of plant operation:

> Cooking acid is a recyclable material that is not expected to be discharged since it is not in the interest of KPC to discharge this reusable material.
>
> It is not necessary, therefore, to sort through the parties arguments on the nuances in the NPDES Regulations and the background documents relating to spills and spill technology, because the cooking acid spill in this cause was not one that could be reasonably anticipated or defended against . . .

Complainant avers that this holding confirms that, even if Respondent could show that its application disclosed bisulfite in its effluent, a spill of the size that was caused by human error in this case, would not have been allowed under the permit. Complainant notes that the Presiding Judge pointed out in the Initial Decision, p.30, that: ". . . under the circumstances, where unexpected human error caused the spill, no viable argument can be made that such a spill could have been foreseen and taken into account as part of the application process, thereby making the discharge one allowed implicitly under the permit." Complainant takes the position that these holdings establish that the decision hinged on the quantity and nature of the spill rather than on the chemical composition of the spilled material. Therefore, Complainant postulates that, even if the hearing is reopened and Respondent establishes that the application disclosed the presence of magnesium bisulfite in the effluent, the holding in the case would still stand. (Id. at 11-13.)

IV. Analysis and Resolution

Generally, motions to reopen a hearing are not lightly to be granted, and the fundamental requirements of Section 22.28(a) will be strictly enforced, Ashland Chemical Co., Dkt. No. RCRA-V-W-86-R-13, Order Denying Motion to Reopen Hearing, September 29, 1987, p. 5; N.O.C., Inc., T/A Noble Oil Co. (NOC), Dkt. No. II-TSCA-PCB-81-0105, Order Denying Motion to Reopen Hearing, May 16, 1983, p.24, aff'd, 1 E.A.D. 977 (CJO, February 28, 1985).

This principle is rooted in the sound considerations that there should be finality in litigation, and that a prevailing party should not be exposed to the risk of having a favorable decision overturned in the absence of substantial reasons, Boliden-Metech, Inc., (Boliden), Dkt. No. TSCA-I-1098 Order Denying Motion to Reopen Hearing, November 15, 1989, p. 9, aff'd, 3 E.A.D. 439 (CJO, November 21, 1990); N.O.C., supra at 24, n. 13. For the reasons explained below, it is concluded that Respondent's motion falls short of the requirements demanded by Section 22.28(a) of the Rules.

Respondent has not demonstrated good cause for failing to produce at the hearing the evidence now proposed to be offered. Respondent's good cause argument is based upon the rationale that, without prior notice, it could not have reasonably anticipated the need to present rebuttal or affirmative testimony in response to evidence alleged to be contrary to EPA's regulations and the scientific community's general understanding. If Respondent considered that it did not have adequate notice of this testimony, then it should have objected to it during the hearing, when corrective action could have been taken. However, the Respondent asserted no objection to the testimony presented on the chemistry of magnesium bisulfite (Tr. 92, 106-07, 123-26), nor did KPC make any request at hearing for an opportunity to submit testimony it now seeks to put into the record through the Motion to Reopen. Similarly, Respondent's post-hearing briefs are also devoid of any type of objection to Complainant's evidence on the chemistry of magnesium bisulfite, nor is there any request therein for an opportunity to present the rebuttal testimony it now proposes to submit in its Motion to Reopen. Since the testimony now sought to be introduced could have readily been prepared before the post hearing briefing period expired or, for that matter, before the hearing was held, it cannot be considered newly discovered

evidence, and the Respondent has presented no viable reason for not attempting to offer this testimony before the Initial Decision was issued. Even, assuming arguendo that KPC was surprised by the testimony at hearing, it could have requested an opportunity to present rebuttal testimony before the hearing closed or, at the very least before the post hearing briefing period expired. To have waited until after the Initial Decision was issued to attempt to present this rebuttal testimony is too late, since Respondent has not shown any good cause for its failure to offer this testimony earlier, when reopening the hearing would have been much more viable option.

Moreover, the issue of whether cooking acid is the same as the chemical constituents described in the permit application was raised as early as the August and September 1991 pleadings of the parties briefing the motions for accelerated decision, and was specific recognized as such on page 4 of the March 2, 1992 order denying those motions. The Respondent cannot, therefore, make a viable argument that it did not have notice of the issue prior to hearing. KPC did not, therefore, have good cause for not having adduced at hearing the evidence it now seeks to introduce, as required by Section 22.28(a) of the Rules.

Further, given Complainant's charge that Respondent never listed spills of raw cooking acid in its permit application, it cannot plead ignorance or surprise on this issue. Respondent knew or should have known that its proffered evidence on "proper disclosure" of cooking acid might be crucial to its contention that the discharge was allowed. Normal pretrial preparation should have included Dr. Jackson's elaborate testimony on the chemistry of cooking acid, and EPA's regulations concerning "sulfite" effluent testing for the NPDES permit application. Instead, Respondent preferred to focus on other arguments, such as the permit placed no

limitations on internal wastestreams that can be discharged, or on spills even though other spill restrictions existed, and EPA knew of the potential for spills. A motion to reopen the hearing, however, cannot be used as a means for correcting errors in strategy or oversights at hearing, F & K Plating Co., Dkt. No. RCRA-VI-427-H Order Denying Motion to Reopen Hearing, June 13, 1986, p. 9, aff'd, 2 E.A.D. 443 (CJO, October 8, 1987).

Lastly, where Respondent is relying on the interests of justice and fundamental fairness to support the motion, a reasonable requirement is that the proffered evidence must be likely to change the result, N.O.C, supra at 28. However, Respondent's proffered testimony on the chemistry and proper disclosure of magnesium bisulfite would not affect the Initial Decision's holding. While the Respondent is correct that the finding on the chemistry of magnesium bisulfite was involved in the finding that the Respondent failed specifically to seek permission to discharge cooking acid, a contrary finding on that point would not have altered the overall outcome that the cooking acid spill was not permitted. The Complainant is correct in its argument that the same rationale relating to spills would apply to the cooking acid discharge even if it was concluded that the magnesium bisulfite was specifically disclosed as part of the plant effluent. Although this rationale was not spelled out in the area of the Initial Decision discussing whether cooking acid was specifically disclosed in the permit application by the listing of maganese and sulfite, Initial Decision, p. 24, it would clearly have applied had the decision reached the opposite conclusion now suggested by KPC. In other words, even if it is conceded, arguendo, that magnesium bisulfite was disclosed in the application as part of the plant effluent, a spill of the magnitude and under the conditions involved in the present case, would nonetheless not be considered as contemplated by the application or allowed by the permit.

It was undisputed that the discharge of cooking acid resulted from an inadvertent human error when an employee, unaware that the digester valve was left open after electrical maintenance, released 4,450 gallons of cooking acid into the digester (Tr. 62). It goes without saying that a spill of this magnitude, caused by an unexpected human error, was clearly not part of normal operations. In point of fact, substantial testimony established exactly the opposite, that cooking acid, being a recyclable material, is not expected to be discharged during normal operations nor is it in KPC's interest to discharge this reusable material (Tr. 65, 67). Moreover, there was extensive testimony that such a large discharge of spilled raw cooking acid was not disclosed in the application as part of normal effluent discharges nor would it have been permitted if requested (Tr. 67, 123-26). Therefore, even if Respondent's proffered evidence were accepted as true, it would not change the holding that this inadvertent spill-discharge was prohibited because it did not result from an effluent discharge expected and disclosed in the permit application as part of normal plant operations.

Accordingly, under the above circumstances, Respondent's motion must be, and hereby is, denied.[2]

Daniel M. Head
Administrative Law Judge

Dated: September 5, 1996
Washington, D.C.

[2] In accordance with Section 22.28(b) of the Rules, 40 C.F.R. § 22.28(b), service of this order restarts the running of the appeals period specified in Section 22.30 of the Rules.

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Respondent's Motion To Reopen Hearing, dated September 5, 1996, was sent in the following manner to the addressees listed below.

Original by Regular Mail to:

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Dated: September 5, 1996
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