

11/16/93

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER ON CROSS MOTIONS FOR ACCELERATED DECISION

This proceeding was initiated on September 11, 1992 when the United States Environmental Protection Agency (EPA or complainant) issued a complaint against respondents ICI Americas, Inc., renamed ZENECA, Inc. (ZENECA) and Dodge City Cooperative Exchange (Dodge City Coop), charging them with a violation of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA or the Act), 7 U.S.C. §§ 136-136y. Respondents are alleged in the complaint to have sold or distributed a pesticide that was adulterated and misbranded, in violation of section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E). Complainant proposes to assess a penalty pursuant to section 14 of FIFRA, 7 U.S.C. § 136l, in the amount of \$5,000 against the respondents for the alleged violation.

Respondent ZENECA is the registrant and manufacturer of the pesticide product SUTAN + 6.7-E (sometimes "SUTAN" or "product") containing the active ingredient "S-ethyl diisobutylthiocarbamate." On January 4, 1990 ZENECA entered into a bulk pesticide "Dealer Consignment Agreement" (Agreement) with Dodge City Coop for the purpose of repackaging and distributing ZENECA's pesticide products, including SUTAN. Dodge City Coop, which operates a

registered pesticide producing establishment in Dodge City, Kansas, repackaged and distributed SUTAN. The product was not to be altered, but put into Dodge City Coop's containers accompanied by ZENECA's label.

On May 8, 1992, a representative from the Kansas State Board of Agriculture conducted an inspection of Dodge City Coop's facility pursuant to section 9(a) of FIFRA. On May 12 the inspector returned to the facility and obtained for analysis a sample of SUTAN from a minibulk container, with which Dodge City Coop had repackaged the product. The analytical results of the sample indicated the presence of the active ingredient "S-ethyl dipropylthiocarbamate" which was not listed as an active ingredient of the label of SUTAN. Consequently, EPA concluded that the product was misbranded and adulterated.

The respondents each answered the complaint and requested a hearing. ZENECA asserted affirmative defenses, including the allegations that the respondents are independent entities, that SUTAN was properly labeled and within label specifications while still the property of ZENECA, and that it had no control over the activities of Dodge City Coop which may have led to any alleged adulteration or misbranding.

On November 2, 1992, ZENECA filed a motion to hold the proceedings in abeyance. It stated that five separate complaints issued by EPA in May 1992 claimed that ZENECA and four other pesticide manufacturers are liable for the same type of violation on the basis of pesticide samples from another repackaging and

distribution establishment. In that the same legal issue is involved in those cases, it asserted that the interests of the parties and judicial economy would be served by suspending this proceeding until a final decision on the merits of EPA's liability claim in the other proceedings. Complainant opposed it and the motion was denied. Prehearing exchange documents were filed by EPA and ZENECA. EPA has reached a settlement with Dodge City Coop in this proceeding.

On February 16, 1993, ZENECA requested a reconsideration of that denial, and the proceeding was stayed until further order from the ALJ. Subsequently the stay was rescinded and ZENECA was ordered to serve any pleadings to address the legal issue referred to in its motion.

Accordingly, on July 27, 1993, ZENECA filed a motion to dismiss or in the alternative for accelerated decision in its favor on the legal issue of manufacturer liability. It argues that the complaint neither alleges causation of the violations by ZENECA nor claims that it distributed or sold any adulterated or mislabeled pesticide to Dodge City Coop. ZENECA urges that neither FIFRA nor applicable regulations impose liability without fault on the manufacturer/registrant of the pesticide for adulteration after the sale or transfer of ownership, custody or control of pesticide products to an independent registered pesticide producer, even though the manufacturer's label appears on the transferred product; and that any such "strict label liability" cannot be imposed without notice and comment rulemaking, because manufacturers would

be subjected to substantive new obligations. ZENECA adds that Dodge City Coop was not acting as its agent, so they could not be deemed to be the same "person" liable under the Act.

On August 6, 1993, complainant filed a response and cross motion for accelerated decision on the basis that it has demonstrated its prima facie case against ZENECA. Pointing out that neither respondent contested the fact that the product was adulterated, it asserts that both ZENECA and Dodge City Coop are the "person" that sold or distributed the adulterated product, and are thus liable according to the language of FIFRA. EPA argues that the process of registration of a pesticide under section 3 of FIFRA establishes who is responsible for its integrity.

In an order issued August 10, 1993, respondent was granted leave to serve a reply to complainant's response, which it did on August 23, 1993. Complainant replied to this submission on August 31, 1993. Although respondent opposed it on grounds that complainant merely repeats arguments already made, complainant's reply is accepted. A clarification, albeit repetitive, may assist the Administrative Law Judge (ALJ) in deciding the issues presented. All of the arguments of the parties have been weighed and they will only be repeated here to the extent deemed necessary for the resolution of the question presented. Any arguments not specifically addressed herein are rejected, as it is sufficient that there be a resolution of only those major questions necessary for a decision.

The parties base much of their arguments on a policy document,

dated July 11, 1977 (1977 policy), which is an enforcement statement applicable to bulk shipments of pesticides (This document is complainant's prehearing exchange exhibit 17.) It applies to the transfer of registered pesticides in bulk shipments from a registrant of the pesticide to a distributor and/or repackager, and specifies the circumstances in which the registrant retains accountability for the pesticide product.

Complainant perceives the 1977 policy as an enabling provision which allows the distributor or repackager to forego registration of the pesticide product and operate under the manufacturer's product registration if certain criteria are met, so the manufacturer remains responsible for pesticide integrity and labeling. In that ZENECA and Dodge City Coop took advantage of the policy and met the criteria, the former retains accountability and is thus liable for any adulteration or mislabeling of the product.

ZENECA interprets the 1977 policy to retain the manufacturer's accountability only in certain relationships between the registrant manufacturer and distributor or repackager, and not in the situation in which the repackager is an independent entity from the manufacturer. ZENECA in essence claims that its duties and potential liability ended once it transferred SUTAN to an independent repackager, Dodge City Coop. It points out that EPA has never interpreted, applied or enforced the 1977 policy or FIFRA against a manufacturer for "strict label liability" except in similar enforcement cases initiated in 1992, none of which has been decided yet.

D I S C U S S I O N

The parties have noted that this is a case of first impression. They agree that there exist no genuine issues of material fact with respect to the issue of liability, and that the latter turns on the issue of law presented. That issue is whether, under the facts of this case, the registrant-manufacturer of a pesticide product is liable for the product's adulteration and misbranding found at the point of sale from a distributor.

The legal analysis begins with construing applicable statutory provisions, then makes a journey through the law of agency, and finally examines the 1977 policy and its application to the factual situation at hand.

Starting with applicable language of the statute, section 14 of FIFRA provides that a civil penalty may be assessed against any "registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter." 7 U.S.C. § 1361. ZENECA, as registrant of SUTAN, may be liable for a penalty if it is in violation of the provisions of FIFRA at issue, sections 12(a)(1)(C) and (E), which provide as follows:

Except as provided by subsection (b) of this section, it shall be unlawful for any person in any State to distribute or sell to any person--

(C) any registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its registration under section 136a of this title;

- (E) any pesticide which is adulterated or misbranded; . . . .

ZENECA's liability turns on whether it is a "person" who distributed or sold such a pesticide. There is no argument or evidence in the record that SUTAN was adulterated or misbranded before it was transferred to Dodge City Coop and repackaged. Therefore the sale or distribution to the customers of Dodge City Coop in the minibulk containers is at issue, not the bulk transfers from ZENECA to Dodge City Coop. Can ZENECA be deemed to be the "person" who distributed or sold the pesticide product to the customers although it was first transferred to, and repackaged by, Dodge City Coop?

Referring to the definitions of those terms, "person" is defined as "any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not." Section 2(s) of FIFRA, 7 U.S.C. § 136(s). "To distribute or sell" means:

to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver. The term does not include the holding or application of registered pesticides or use dilutions thereof by any applicator who provides a service of controlling pests without delivering any unapplied pesticide to any person so served.

Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg).<sup>1</sup> The terms are defined very broadly.

Complainant argues that Dodge City Coop and ZENECA are the same "person" under the theory that in effect ZENECA and Dodge City Coop are partners, working together to distribute and sell the product, for which each is responsible. (Cross motion at 19-20.) However, there is no evidence in the record of any partnership agreement.

An alternative theory set forth by complainant is that the repackager stands in the shoes of ZENECA throughout the sale or distribution, so the actions of Dodge City Coop are imputed to ZENECA. That would depend on whether respondents were in an agent and principal relationship. ZENECA argues that complainant has not established three elements of agency, namely that (1) the agent is authorized to act for and bind the principal, (2) the agent is subject to the principal's direction and control, and (3) the agent is acting primarily for the benefit of the principal (Motion to dismiss at 31).

At the outset it should be pointed out that the fact that the respondents are both corporations is not determinative; any corporation may be the agent of another corporation. Comind, Companhia de Seguros v. Sikorsky Aircraft, 116 F.R.D. 397, 403

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<sup>1</sup> The regulatory definition of "distribute or sell" is "the acts of distributing, selling, offering for sale, holding for sale, shipping, holding for shipment, delivering for shipment, or receiving and (having so received) delivering or offering to deliver, or releasing for shipment to any person in any State." 40 C.F.R. § 152.3(j).



(D.Conn 1987).

Agency is a legal concept which:

does not depend on the intent of the parties to create it, nor their belief that they have done so . . . . if the agreement results in the factual relation between them to which are attached the legal consequences of agency, an agency exists although the parties did not call it agency and did not intend the legal consequences of the relation to follow . . . . The agency relation results if, but only if, there is an understanding between the parties which, as interpreted by the court, creates a fiduciary relation in which the fiduciary is subject to the directions of the one on whose account he acts. Restatement (Second) of Agency § 1 comment b (1958).

The required factual elements are: "the manifestation by the principal that the agent shall act for him, the agent's acceptance of the undertaking and the understanding of the parties that the principal is to be in control of the undertaking." Id.

The relationship between ZENECA and Dodge City Coop is set forth in the Agreement, which is a consignment arrangement. It has some characteristics of a buyer-seller relationship, which is distinct from an agency relationship. To determine which relationship existed, the Agreement and the intent and actions of the respondents must be analyzed in light of principles of agency and caselaw on the subject.

The Restatement (Second) of Agency § 14J, discusses the difference between agent and buyer as follows, in pertinent part:

One who receives goods from another for resale to a third person is not thereby the other's agent in the transaction: whether he is an agent for this purpose or is himself a buyer depends upon whether the parties agree that his duty is to act primarily for the benefit

of the one delivering the goods to him or is to act primarily for his own benefit.

Comment:

a. . . . It is true that a paid agent normally acts in large measure to advance his own interests and that a buyer frequently must advance the interests of the seller, if he is to effect a resale of the property. The ultimate distinction is that between fiduciary and non-fiduciary. However, buyers may assume fiduciary duties to the sellers without thereby becoming agents.

b. Indications of a sale. . . . The typical difficult case is that of a "sale on consignment", which may be an immediate sale, or a sale to the consignee when the goods are sold to him by a third person, or an agency. The following factors indicate a sale although no one factor is determinative:

(1) That the consignee gets legal title and possession of the goods. However, one can transfer legal title to an agent so that he can deal more freely with the subject matter.

(2) That the consignee becomes responsible for an agreed price, either at once or when the goods are sold.

(3) That the consignee can fix the price at which he sells without accounting to the transferor for the difference between what he obtains and the price he pays. [But] an agent may be allowed to fix the selling price and keep the difference as compensation . . . .

(4) That the goods are incomplete or unfinished and it is understood that the transferee is to make additions to them or complete the process of manufacture.

(5) That the risk of loss or accident is upon the transferee.

(6) That the transferee deals, or has a right to deal, with the goods of persons other than the transferor.

(7) That the transferee deals in his own name and does not disclose that the goods are those of another.

The Agreement provides that the product is to be stored in bulk tanks approved by an agent of ZENECA, labeled "property of ICI"

Americas, Inc." at Dodge City Coop's facility; that title to the product remains with ZENECA until it is purchased; that any removal of the product from the tank is deemed a purchase by Dodge City Coop; and that insurance for accidental physical loss remains with ZENECA until the product is withdrawn from the tank or invoiced. (Complainant's prehearing exhibit ("CX") 14 ¶¶ 1, 4, 5, 9, 10).

ZENECA was in control of how much of the product inventory was stored at the facility, and could adjust or withdraw its inventory at any time, and had right of access to the tanks and the facility at all times for that purpose (CX 14 ¶ 1). The Agreement sets forth ZENECA's requirements for the manner of storage of the product at the facility, including physically segregating the product from other goods, using due care in the storage, handling and movement of the product and assuring that the quality and integrity of the product are maintained unchanged after delivery to Dodge City Coop (CX 14 ¶ 4). Dodge City was also responsible for reporting monthly to ZENECA regarding disposition and replacement of all inventory of the product (CX 14 ¶ 12). In a letter dated April 24, 1991, ZENECA issued written instructions for Dodge City Coop to clean the containers into which SUTAN was to be repackaged (CX 16).

As long as the product is within the bulk tanks, there clearly seems to be an agency relationship between the respondents. However, the agency relationship does not end when the product is removed from the tanks, purchased and repackaged by Dodge City Coop.

The fact that legal title to the product passed to Dodge City Coop is not determinative, and may be overcome by an agency agreement. Culbertson v. Jno. McCall Coal Co., 275 F.Supp. 662, 679 (S.D.W.Va. 1967). One who holds title to property but is also subject to control by the beneficiary is an agent-trustee. SEC v. American Board of Trade, Inc., 654 F.Supp. 361, 366 (S.D.N.Y. 1987), *aff'd in part*, 830 F.2d 431, cert. denied, 485 U.S. 938 (1988).

An essential characteristic of an agency relationship is that the agent acts subject to the principal's direction and control. In re Shulman Transport Enterprises, Inc., 744 F.2d 293, 295 (2d Cir. 1984). The Restatement (Second) of Agency § 1, comment b provides, "It is the element of continuous subjection to the will of the principal which distinguishes the agent from other fiduciaries and the agency agreement from other agreements."

The intent of ZENECA is obviously to sell as much of the product as possible so that it profits financially, which is entirely dependent on sales to the customers of Dodge City Coop, which is its only distributor of SUTAN. Dodge City Coop is merely the "middleman." The question of whether Dodge City Coop was acting primarily for its own benefit or for the benefit of ZENECA is not easy to identify with respect to the repackaging part of the relationship, but is clearly primarily for ZENECA's benefit with regard to the storage of the product at Dodge City Coop's facility.

The Agreement seems to separate the storage and sale operations, yet it does not appear that there is any purpose in

storing the product at the facility except for the ultimate sale to Dodge City Coop's customers. The fact of repackaging for sale to the customers is not emphasized, but the use of the product by those customers is the ultimate purpose for which ZENECA manufactures it. The storage and repackaging of the product are parts of the same function and appear as a practical matter to be a contiguous operation. In reality, behind the facade of a buyer-seller agreement, there exists an underlying agreement for Dodge City Coop to act on ZENECA's behalf as distributor of the product. Therefore, despite any superficial appearance of a mere buyer and seller, the essence of the relationship is that of principal and agent.

Dodge City Coop was authorized to store and repackage SUTAN, and any contamination of it was incidental to acts authorized by ZENECA, subjecting ZENECA, as principal, to liability therefor.<sup>2</sup> Under section 14(b)(4) of FIFRA, the acts of Dodge City Coop are

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<sup>2</sup> General standards of agency which are consistent with the rationale in this decision are the following. "The liability of the principal to a third person upon a transaction conducted by an agent, or the transfer of his interests by an agent, may be based upon the fact that . . . the agent was authorized . . . ." Restatement (Second) of Agency § 140. "A general agent for a disclosed or partially disclosed principal subjects his principal to liability for acts done on his account which usually accompany or are incidental to transactions which the agent is authorized to conduct if, although they are forbidden by the principal, the other party reasonably believes that the agent is authorized to do them and has no notice that he is not so authorized." *Id.* § 161. "A . . . principal may be liable to another whose interests have been invaded by the tortious conduct of a[n] . . . agent, although the principal does not . . . authorize the conduct of the agent causing the invasion . . . . [L]iability is normally based upon the fact that the tort is brought about in the course of an undertaking for the benefit, and subject to the right, of the principal to control his . . . agent." *Id.* § 216, comment a.

deemed to be the acts of ZENECA. That section provides:

Acts of officers, agents, etc.-- When construing and enforcing the provisions of this subchapter, the act, omission, or failure of any officer, agent, or other person acting for or employed by any person shall in every case be also deemed to be the act, omission, or failure of such person as well as that of the person employed.

Although it falls under the heading "Criminal Penalties," it has been construed repeatedly to apply to civil administrative proceedings under FIFRA. In re Terra International, Inc., d/b/a Terra Chemicals, Inc., and Brian Smith, I.F. & R. Docket No. R-VII-996C-90P and -995C-90P, at 32 (Initial Decision, September 3, 1992); In re Gary Busboom, Docket No. FIFRA-09-0641-C-89-06, n. 28 (Initial Decision, October 17, 1991); In re Evergreen Helicopters, Inc., I.F. & R. Docket No. IV-214C at 8 (Order Denying Respondent's Motion for Accelerated Decision, June 10, 1977); In re Evergreen Pest Control, I.F. & R. Docket No. IX-157C, at 39-40 (Initial Decision, September 29, 1977).

Dodge City Coop, among other acts beneficial to ZENECA, was authorized to store, repackage and sell SUTAN at its facility. For this and other reasons mentioned above it is concluded that the respondents were in an agency relationship. The adulteration and misbranding of the product by Dodge City Coop is deemed to be adulteration and misbranding by ZENECA.

Turning to the 1977 policy, it supports a finding that ZENECA may be held liable for the adulteration and misbranding of the

product. While it is not legally binding,<sup>3</sup> it buttresses EPA's arguments. The stated purpose of the 1977 policy is to define the limits of the bulk shipment and transfer practice, because they are "in some cases unclear or unaddressed by the Act and regulations." (CX 17 at 1). If the bulk transfer "involves only the changing of the product container with no change 1) to the pesticide formulation, 2) to the product's accepted labeling, . . . and 3) to the identity of the party accountable for the product's integrity, the new product resulting from transfer will be considered as encompassed within the terms of the registration of the product which was transferred" (CX 17 at 2). That is, the 1977 policy defines an exception to the product registration requirement.<sup>4</sup> The

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<sup>3</sup> See, Robert A. Anthony, *Interpretive Rules, Policy Statements, Guidances, Manuals, and the Like--Should Federal Agencies Use Them to Bind the Public?* 41 Duke Law Journal 1311 (1992).

<sup>4</sup> The product registration requirement of FIFRA section 3(a) states: "... no person may distribute, sell offer for sale, hold for sale ... to any person any pesticide which is not registered with the Administrator."

Repackaging constitutes production of the pesticide under 40 C.F.R. § 167.3, and the resulting product is a pesticide being held for sale, thus subject to registration under FIFRA section 3(a) (see CX 17 at 3).

EPA has provided an interpretation in the Federal Register, Appendix to Pesticides Enforcement Policy Statement No. 6 (41 Fed. Reg. 55932, 55934, December 23, 1976) as follows:

Before a pesticide product which is not encompassed within the terms of an existing registration enters the channels of trade, a separate registration must be obtained. Changes in the formulation of a registered product, changes in accepted labeling, as well as any repackaging of a pesticide into another container will activate the registration requirement, unless the purposes of product registration would be fully met by carrying forward the Federal registration of the constituent product. (CX 17).

transferee is not required to register the product, but may rely on the transferor's registration.

Therefore, the transferee must either register the product separately, or abide by the terms of the 1977 policy.<sup>5</sup> Respondents entered into the "consignment" Agreement with the intent to relieve Dodge City Coop from registering the product separately. This is clear from the agreement that ZENECA's labels, with its product registration number thereon, must accompany all shipments of the product by Dodge City Coop (CX 9, 14). It is also evident from the letter from ZENECA dated April 24, 1991, directing its bulk pesticide dealers to adhere to the provisions of the March 24, 1991 amendments of the 1977 policy (CX 16).

In that the respondents opted for avoiding a separate product registration, they have chosen to abide by the registration exception specified in the 1977 policy. That exception requires that there be no change to the accountable party. Yet ZENECA, by some form of legal legerdemain, is attempting to change the party accountable for the product to Dodge City Coop.

Respondents are striving to circumvent the terms of the policy and carve out their own exception to the product registration

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<sup>5</sup> "Thus, to the extent that a bulk transfer involves changing the container, e.g., repackaging a registered end-use pesticide with no change to the pesticide formulation, its label or the accountable party, the repackaged product is encompassed within the terms of the original registration. This means that the original registration will have satisfied the purposes of section 3 as to the repackaged pesticide. Conversely, if any of these factors change, the corresponding purpose of the registration will be unsatisfied, thereby activating the registration requirement for the repackaged product." CX 17 at 3.



requirement, by virtue of the distributor/repackager being independent. In effect, ZENECA is asking the ALJ to create an exception to the 1977 policy for a manufacturer who desires to save its distributor from a separate registration but wants to avoid accountability for its repackaged product. This is tantamount to "having one's cake and eating it too." No basis in law or policy for such an arrangement has been presented by ZENECA.

Indeed, if respondent's rationale were followed, the intent of FIFRA's product registration requirement would be vitiated in such circumstances, and the public interest would be ill served. Pesticide manufacturers could have their bulk products repackaged and distributed without the cost of registering the product by the repackager, yet also be relieved of responsibility after transfer to the repackager. That would place the burden of maintaining product integrity on the repackager/distributor, which generally is not as well equipped to do so as the pesticide manufacturer. As a result, there would be an increased likelihood of contaminated and misbranded pesticides reaching the public. If the manufacturer wants the benefit of avoiding liability for the product after it is transferred to the repackager, then the manufacturer must bear the burden of requiring the repackager to register the product. This is clearly reflected in the 1977 policy.

Respondent merely attempts to distinguish its relationship with Dodge City Coop from the bulk transfer relationships listed in the policy as retaining registrant (manufacturer) accountability, which are as follows: (1) an establishment owned by the registrant,

(2) a registered establishment operated under contract with registrant, and (3) a registered establishment owned by a party not under contract to the product registrant, but who has been furnished written authorization for use of the product label by registrant.

If respondents claim that they are not any of those relationships, then they simply do not fit the exception stated in the policy and are back in the position of being required to register the product again in Dodge City Coop's name. Nothing in the record indicates any intent for Dodge City Coop to do so. To the contrary, and as noted above, the provision in the Agreement requiring ZENECA's label to accompany all shipments of the product from Dodge City Coop indicates that the respondents intended to avoid such additional registration.

In sum, under the 1977 policy, the language of the Act, the law of agency, and because FIFRA is a strict liability statute,<sup>6</sup> ZENECA cannot escape liability for the misbranding and adulteration of SUTAN. It is concluded that there exists no genuine issue of material fact concerning liability in this matter, and that complainant is entitled to an accelerated decision as a matter of law with respect to ZENECA's liability for the violation alleged in the complaint. It is concluded that ZENECA has violated sections 12(a)(1)(C) and (E) of FIFRA, 7 U.S.C. § 136j(a)(1)(C) and (E), as charged in the complaint.

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<sup>6</sup> In re South Coast Chemical, Inc., FIFRA Appeal No. 84-4 at 5 (Order Reversing and Remanding Initial Decision, March 11, 1986).

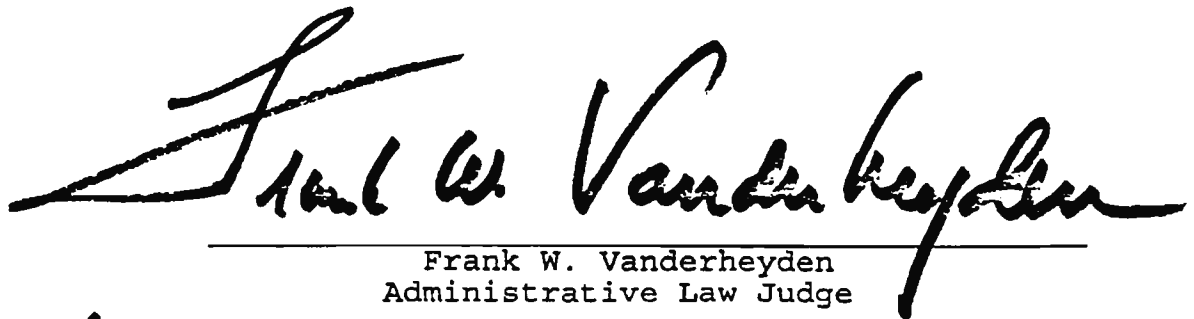
In the conclusion section of its cross motion, complainant also seeks an accelerated decision on the \$5,000 proposed penalty. The ALJ declines to grant an accelerated decision on the penalty question. The reasons for such declination, among others, are: (1) section 1361(a)(3) states that no civil penalty shall be assessed unless a party is given notice and an opportunity for a hearing; (2) respondent here has not waived its opportunity for a hearing and agreed to have the penalty issue decided on submissions; and (3) even if the latter occurred, respondent has not been accorded an opportunity to address the factors set out in section 1361(a)(4) to be considered in assessing a penalty.

The proceeding will continue for purposes of determining the amount of any civil penalty to be assessed against ZENECA for the violation.

ORDER

IT IS ORDERED that:

1. The motion of respondent ZENECA, Inc. to dismiss or in the alternative for an accelerated decision be DENIED.
2. Complainant's cross motion for accelerated decision as to liability be GRANTED.
3. The parties engage in good faith settlement negotiations concerning the amount of civil penalty in this matter.
4. Complainant submit a status report to the undersigned no later than thirty days from the service date of this order.

  
Frank W. Vanderheyden  
Administrative Law Judge

Dated: September 16, 1993

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

Certificate of Service

I certify that the foregoing Order, dated 11/16/93, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

Ms. Venessa Cobbs  
Regional Hearing Clerk  
U.S. Environmental Protection  
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Dated: November 16, 1993