UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
Concord Trading Corporation	)	**Docket No. TSCA-94-H-19**
	)	**Judge Greene**
Respondent	)	

ORDER UPON MOTION FOR JUDGMENT AS TO LIABILITY

This matter arises under Sections 5(a)(1), 15(1)(B), and 15(3)(B) of the Toxic Substances Control Act ("TSCA" or "the Act"), 15 U.S.C. §§ 2604(a)(1), 2614(1)(B), 2614(3)(B). The first count of the complaint charges that Respondent violated the Act when it failed on ten separate occasions in 1991-1994 to submit a pre- manufacture notice ("notice") to the U. S. Environmental Protec- tion Agency (EPA) of the intent to import depleted zinc oxide ("DZO"), alleged to be a "new chemical substance," into the United States.

Complainant moved for summary decision as to liability with respect to Count I on the grounds that (1) no material facts remain at issue, and (2) that Complainant is entitled to judgment as a matter of law.[(1)] The question posed by a motion for summary judgment may be summarized as "whether the evidence presents a sufficient disagreement to require submission to [a trier of fact] or whether it is so one-sided that one party must prevail as a matter of law,[(2)] and it is certainly true that summary judgment is appropriate where the only issue to be decided is entirely a question of law. For the reasons set forth below, however, it is determined that Complainant has not adequately demonstrated entitlement to judgment as a matter of law. Accordingly, the motion is denied at this time.

Section 5(a)(1)(A) [15 U. S.C. § 2604(a)(1)(A)] provides that no person may import a "new chemical substance," defined as

. . . . any chemical substance which is not

included in the chemical substance list com-

piled and published under section 2607(b)

. . . ."[(3)],

without submitting to the EPA Administrator at least ninety (90) days in advance a notice of the intention to import such substance. Count I alleges that DZO is a "new chemical substance" because it is not included in the chemical substance list, or TSCA inventory, compiled and published by EPA in accordance with section 8(b) of TSCA, 15 U.S.C. § 2607(b)[(4)]; and that the several failures of Respondent to submit notices before importing DZO therefore constituted violations of sections 5(a)(1)(A) and 15(1)(B) / 15(3)(B) of the Act.[(5)]

Respondent's answer admitted the importations, denied that notices to the Administrator had been required, and asserted affirmativly that DZO is not a "new chemical substance" because it is the same "chemical substance," *as that term is defined in the Act*,[(6)] as zinc oxide; zinc oxide is included in the inventory.[(7)] That is, Respondent takes the position that DZO is listed because zinc oxide is listed; DZO and zinc oxide ". . . . have identical molecular structures, and the zinc contained in both has the same atomic number. Therefore, DZO and zinc oxide exhibit the same chemical behavior and are the same chemical. The only distinction between DZO and zinc oxide occurs at the sub-atomic level."[(8)]

Complainant's motion argues that no facts remain at issue: it is a fact that DZO is not included in the inventory, according to the motion. Consequently, by definition [TSCA § 3(9)], DZO is a "new chemical substance." In support of this view, Complainant offered evidence from the Chief of the EPA Chemical Inventory Section. The affidavit states, *inter alia*,

For purposes of the TSCA Chemical Substance

Inventory, a substance containing a distribution of

isotopes in one or more of its atoms that is different

from the distribution of naturally-occurring isotopes for those atoms, is considered a different chemical substance from the corresponding substance of identical atomic structure whose atoms are of the naturally occurring isotopic distributions. Substances manufactured with such isotopic differences are named differently and listed separately on the Inventory.[9]

Respondent argues in opposition to the motion that, for purposes of deciding this matter the identity of a chemical substance must be determined at the molecular level[10], not the sub-atomic level addressed in the affidavit, because the words "chemical substance" are defined at section 3(2)(A), 15 U. S. C. § 2602(2)(A), in terms of *molecular* identity:

. . . . the term `chemical substance' means any organic or inorganic substance *of a particular molecular identity* including --

(i) any combination of such substances occurring in whole or in part as a result of a chemical reaction or occurring in nature and

(ii) any element or uncombined radical. (Emphasis supplied)

Therefore, according to Respondent, a notice is not required before DZO may be imported because, having the same *molecular* identity as zinc oxide, it is not a "new chemical substance."[11] Even if the Zn^{64} isotope has been removed from the zinc atom,[12] according to Respondent, the separation or removal does not change the chemical behavior of DZO from that of zinc oxide.[13]

Thereafter, the parties having been given an opportunity to file additional briefs, Complainant submitted an affidavit[(14)] in which it was asserted that the term "chemical substance," i. e. "any organic or inorganic substance of a particular molecular identity"[(15)] includes distinctions among molecules containing atoms of different isotopes; and that, while DZO has a crystal structure similar to naturally occurring zinc oxide, it is chemically and physically distinct.[(16)]

Respondent notes that Complainant offered no information concerning the effect of the depletion of $zinc^{64}$ atoms on the toxicity or chemical composition of zinc oxide, and argues that no liability should attach to the failure to give notice in advance of importation because Complainant's apparent inability to point to regulations, policy statements or guidance documents in support of its broad interpretation of "chemical substance" demonstrates that Respondent was not and could not have been on notice of it.[(17)] Respondent relies upon *General Electric Co. v. United States Environmental Protection Agency*, 53 F.3d 1324, 1333-1334 (D.C. Cir. 1995) which generally supports the proposition that where agency regulations and other policy statements are unclear, a regulated party has not been given fair notice of the agency's interpretation of those rules -- and that the assessment of civil penalties for violations in such circumstances is unfair.[(18)]

In reply, Complainant produced a copy of portions of the TSCA inventory to show that separate listings are present for certain isotopically distinct chemical substances; it is urged that the appearance of isotopically distinct chemicals in the TSCA inventory constitutes sufficient notice to Respondent that DZO is a "new chemical substance" within the meaning of the Act.[(19)]

It cannot be disputed that the words "depleted zinc oxide" do not appear in the section 8(b) [§ 2607(b)] chemical substances list, but this fact does little to advance the inquiry into whether DZO is listed, or is a "new chemical substance," or may be imported without notice. Since the term "chemical substance" has been defined by the Act in such a way as to distinguish among chemicals according to their particular *molecular* identities, since it seems that zinc oxide and DZO have the same *molecular* identity if "molecular" refers only to molecules, and since the complaint alleges that DZO is a "new chemical substance" because of a difference between the two in sub-atomic structure, it is clear that the central legal issues cannot be resolved on basis of the current record.[(20)]

More information is required before the words "molecular identity" can be regarded as adequate to distinguish DZO from zinc oxide ***as a matter of law***; this, after all, is the penultimate legal issue.

Remaining, therefore, are the questions of whether DZO is a "new chemical substance" or whether, given the statutory definition of "chemical substance," it is comprehended within the zinc oxide listing based upon its *molecular* identity, without further inquiry being required. Complainant has not demonstrated, by a sufficient margin to be entitled to legal conclusions, (1) that DZO is not listed in the chemical substance inventory, (2) that DZO is a "new chemical substance;"[(21)] (3) that the scope of the definition of "chemical substance" contended for[(22)] should prevail; and, if so, (4) whether Respondent had adequate notice of such definition of "chemical substance". Greater certainty than is afforded by the the current record must accompany legal conclusions of this type and -- it must be supposed -- of this significance.

Accordingly, therefore, Complainant is not entitled to judgment as a matter of law with respect to Count I of the complaint at this point in the proceedings, based upon this record.

ORDER

It is hereby ordered that Complainant's motion shall be and it is hereby denied. And it is **FURTHER ORDERED** that the parties should consider their positions in light of the above, and shall be available for a telephone conference call with this office during the week ending August 22, 1997, to discuss status and to arrange for the continued progress of this matter.

J. F. Greene

Administrative Law Judge

July 24, 1997: Washington, D. C.

1. Complainant's *Motion for Partial Accelerated Decision*, September 29, 1995, at (unnumbered) 1.

2. Anderson v. Liberty Lobby, 477 U.S. 242, 251-52 (1986).

See also 40 C.F.R. § 22.20(2), which provides that an "accelerated decision" may be rendered at any time in favor of one of the parties as to all or any part of the proceeding "if no genuine issue of material fact exists *and a party is entitled to judgment as a matter of law*, as to all or any part of the proceeding." (Emphasis added)

3. Section § 3(9) of the Act, 15 U. S. C. § 2602(9).

4. Section 8(b) [§ 2607(b)] of the Act requires that "The Administrator shall compile, keep current, and publish a list of each chemical substance which is manufactured or processed in the United States. Such list shall at least include each chemical substance which any person reports, under section 2604 of this title . . . is manufactured or processed in the United States . . . ."

5. The complaint also states that Respondent " . . . . voluntarily notified EPA that Respondent. . . (imported) to its facility, the new chemical substance Depleted Zinc Oxide . . . for use in the United States." *Complaint* at (unnumbered) 2, ¶ 1.

6. Section 3(2)(A) of the Act, 15 U.S.C. § 2602(2)(A).

7. *Answer* to the complaint at 2, ¶¶ 6, 14.

8. Respondent's *Answer* to the complaint, at 2-3.

9. Affidavit of Mr. Henry Lau, Chief, EPA Chemical Inventory Section, Office of Prevention, Pesticides and Toxic Substances.

10. Respondent's *Response to Complainant's Motion for Partial Accelerated Decision*, at 3.

11. Respondent suggests that, for clarity of analysis, one inserts the definition of "chemical substance" into the definition of "new chemical substance," thus:

The term "new chemical substance" means any organic

or inorganic substance of a particular molecular identity

. . . . Id. at 2.

12. Id. at 3.

13. *Answer* to the complaint, at 3, ¶ 14.

14. Affidavit of Dr. Doyoung Lee of the EPA Chemical Inventory Section, Office of Prevention, Pesticides and Toxic Substances; December 13, 1996.

15. TSCA § 3(2)(A), 15 U.S.C. § 2602(2)(A).

16. Complainant's *Reply in Support of Motion for Partial Accelerated Decision*, December 13, 1996.

17. Respondent's *Sur-reply to Complainant's Motion for Partial Accelerated Decision*, January 31, 1997.

18. The court appeared to be affected to some extent by what it perceived as EPA's own "struggle" at various stages of this partic- ular matter to provide a consistent or definitive reading of the regulatory requirements in question. *General Electric Company*, at 1333-1334.

19. Attachment to Complainant's *Reply In Support of Motion for Partial Accelerated Decision*, January 17, 1997.

20. Whether DZO is listed in the Section 8(b) chemical substances inventory can also be seen as a question of fact, even though the fact may not be decided without reaching a legal con- clusion or two. To the extent that this question is factual, it is definitely in dispute, with much to be argued and brought to bear on both sides, as the parties' briefs amply demonstrate. In conse- quence, Complainant's motion would be denied on that basis, apart from the matter of conclusions of law.

21. It should be noted that no one has contended that DZO and zinc oxide are *physically and chemically indistinguishable.* See particularly the affidavit of Dr. Lee, appended to Complainant's *Reply* of December 13, 1996. Rather, the heart of the matter is whether the definition of "chemical substance" at section (3)(2)(A) of the Act distinguishes them.

22. Complainant's *Reply in Support of Motion for Partial Accelerated Decision*, together with the (appended thereto) affidavot of Dr. Lee, December 13, 1996.