

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of: *
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CALIFORNIA GRAPE & TREE * FIFRA Docket Nos. 631 et al
FRUIT LEAGUE, et al., *
*
*
Petitioners. * DECISION

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

1) Cancellation: The failure of parties to appear at a Pre-Hearing Conference is grounds for their dismissal as parties to the action, absent any reason for such non-appearance;

2) Cancellation: Where the relevant statute prescribes the permissible issues to be considered, failure of Petitioners to raise such issues is grounds for the granting of a motion for summary determination in the favor of the Respondent which, in this case, disposed of all matters before the court.

APPEARANCES:

Respondent: Robert Perlis, Esq.
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Petitioners: Richard L. Krause, Esq.
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Mr. Merlin L. Fagan, Jr.
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California Farm Bureau Federation
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Tull Chemical Company: Charles Wigley

This matter is before me as the result of the Environmental Protection Agency's (EPA) publication in the Federal Register on October 12, 1988, pursuant to Section 6(e) of the Federal Insecticide, Fungicide and Rodenticide Act, of a Notice of Intent to Cancel Conditional Registration of Tull Chemical Company, Inc., (Tull) for a technical grade pesticide product with the active ingredient sodium fluoroacetate (more commonly known as compound 1080). 53 Fed. Reg. 39792 et seq. Timely requests for a hearing on this Notice were filed by the California Grape and Tree Fruit League, the California Farm Bureau Federation, the New Mexico Farm and Livestock Bureau, Idaho Farm Bureau Federation, Colorado Farm Bureau, and Washington State Farm Bureau. By Order dated November 16, 1988, these requests were consolidated by the Administrative Law Judge into the above-captioned proceeding. In addition to the requests consolidated in this proceeding, two other requests for hearing have been filed. The other two requests were made by the California Cattlemen's Association and the Agricultural Council of California. The Agricultural Council of California was notified by the Hearing Clerk by letter dated December 22, 1988, that its request for hearing could not be processed because of untimeliness. The Cattlemen's request is apparently still pending and although it was submitted five (5) days late the Court will include that entity as a party to this proceeding.

This matter is immediately before me on a Motion for an Accelerated Decision made by the Respondent EPA pursuant to 44 CFR Section 164.91.

FACTUAL BACKGROUND

On November 22, 1985, EPA culminated a "special review" of pesticide products containing compound 1080 by issuing a Notice of Intent to Cancel such products unless the registrant submitted an application for amended registration within 30 days. A copy of that Notice was sent to Tull, the only manufacturer at that time of technical grade 1080. The Notice also contained requirements for the submission of data necessary to support continued registration under Section 3 of FIFRA of a technical 1080 product. Tull did not respond to the Notice, and its technical registration was therefore cancelled by operation of law on February 18, 1986. This cancellation was made pursuant to FIFRA Section 6(b).

On November 13, 1986, in response to an application by the company, EPA issued to Tull a conditional registration pursuant to FIFRA Section 3(c)(7)(A) for a technical grade product containing 1080 as an active ingredient. One of the conditions of this conditional registration was that:

"Submit/Cite all data required for registration/registration of your product under FIFRA Section 3(c)(5) when the Agency requires all registrants of similar products to submit such data."

The conditional registration also contained a detailed schedule identifying the data requirements for 1080 products that were then outstanding and providing the dates by which each requirement was due. According to this schedule, the relevant data were due in January and April 1987. Tull was explicitly warned that "if any of the data requirements are not submitted to the Agency by the due date this registration

will be cancelled." Tull was also on notice that if any of the conditions of the conditional registration were not met, the registration would be subject to cancellation pursuant to FIFRA Section 6(e).

As set forth in 53 Fed. Reg. at 39794-39802, neither Tull nor any other person submitted acceptable data in response to the November 22, 1985, data requirements. Despite the failure of Tull and any other entity to supply the Agency with the required data, EPA did not however cancel Tull's registration in 1987. Instead, after the Agency held a public meeting in Denver to explain the basis for the data requirements and clarify procedures for developing the data, EPA on December 17, 1987, offered to extend the time for submitting data to support 1080 registrations if the affected registrant within 30 days committed to meet a new schedule included in the extension offer.

Tull did not respond to the Agency's conditional offer of an extension of time within the allotted 30 days. Instead of taking action against Tull at that time, the Agency notified Tull by letter dated May 27, 1988, that continuing failure by Tull to respond to the December 17, 1987, extension conditional offer could "lead to the Agency taking administrative action" against Tull. As of this date, Tull has never responded to the Agency's December 17, 1987, conditional offer of an extension of time.

In the face of the registrant's continuing failure to live up to the conditions of its conditional registration, EPA on October 4, 1988, issued a Notice of Intent to Cancel Tull's registration pursuant to Section 6(e) FIFRA. This Notice was received by Tull on October 7, 1988 and was also published in the Federal Register on October 12, 1988. This

Notice made clear that the basis for the cancellation was the failure on the part of Tull to live up to its obligations under its conditional registration. The Notice further stated that any person intending to request a hearing had to make such a request within 30 days of the registrant's receipt of the Notice, that the request must comply with 40 CFR Part 164, and that the request for hearing must be "accompanied by objections specific to each use of the pesticide product for which a hearing is requested." This notification appeared in 53 Fed. Reg. at 39803. Following a request for hearing by the organizations noted above, by Order dated December 07, 1988, the undersigned set a prehearing conference and required all parties other than Respondent to file by December 16, 1988, a statement setting forth whether the party intended to present evidence at the hearing and if so, identifying the objections raised in the parties hearing request upon which the party intended to present such evidence.

The prehearing conference was held on January 10, 1989, and of the six (6) Petitioners consolidated in this proceeding only two (2) entered an appearance at the prehearing conference. The other four (4) Petitioners, the California Grape and Tree Fruit League, the New Mexico Farm and Livestock Bureau, the Idaho Farm Bureau Federation and the Washington State Farm Bureau neither appeared at the prehearing conference nor provided any advance explanation of their failure to appear. Also by Motion dated January 9, 1989, the Respondent, EPA filed its Motion for an Accelerated Decision. Upon noting the absence of the above-named parties, EPA filed a Supplemental Motion for an Accelerated Decision as to these

absent parties and sought their dismissal from action for failure to appear in accordance with the Prehearing Order issued by the Court.

40 CFR Section 164.91(4) provides that the Administrative Law Judge may, at any time, issue an Accelerated Decision in favor of Respondent to all or any part of the proceedings for "failure to appear or proceed at prehearing conferences." Pursuant to that regulation the Respondent, EPA seeks the immediate dismissal from this proceeding of the four (4) above-mentioned Petitioners due to their failure to appear at the prehearing conference. In addition to the regulatory language cited above, the Respondent also argues that since this proceeding was triggered by the filing by the six (6) Petitioners of objections to a proposed cancellation, the proposed cancellation would have taken effect in 30 days but for their actions: The sole purpose of the proceedings is to explore Petitioners objections to the proposed cancellation. Also under the Agency's regulations the Petitioners (as proponents of continuing registration) have the ultimate burden of proof in this proceeding. See 40 CFR Section 164.80(b). Since the four (4) above mentioned Petitioners who were absent from the prehearing conference appear to be no longer interested in this proceeding then their petition should no longer serve to delay the effectiveness of the Agency's proposed actions.

It is therefore my ruling that the Motion to Dismiss the above-mentioned Petitioners as well as the California Cattlemen's Association is granted and they are hereby **DISMISSED** from this proceeding.

APPLICABLE STATUTORY AND REGULATION PROVISIONS

Section 3(c)(7)(A) allows the Administrator to conditionally register a pesticide if certain conditions are met. This Section requires that an applicant being granted a conditional registration submit such data as is required for registration of pesticides under Section 3(c)(5) of FIFRA.

Section 6(e) of FIFRA provides for the cancellation of conditional registrations under certain specified circumstances. Section 6(e)(1) of FIFRA provides that:

The Administrator shall issue a notice of intent to cancel a registration issued under Section 3(c)(7) of this Act if (A) the Administrator, at any time during the period provided for satisfaction of any condition imposed, determines that the registrant has failed to initiate and pursue appropriate action toward fulfilling any condition imposed, or (B) at the end of the period provided for satisfaction of any condition imposed, that condition has not been met. The Administrator may permit the continued sale and use of existing stocks of a pesticide whose conditional registration has been canceled under this subsection to such extent, under such conditions, and for such uses as the Administrator may specify if the Administrator determines that such sale or use is not inconsistent with the purposes of this Act and will not have unreasonable adverse effects on the environment.

Section 6(e)(2) of FIFRA provides the procedures that must be followed in the event a notice of intent to cancel is issued pursuant to the above quoted statute. The pertinent portion of Section 6(3)(2) provides:

A cancellation proposed under this subsection shall become final and effective at the end of 30 days from receipt by the registrant of the notice of intent to

cancel unless during that time a request for hearing is made by a person adversely affected by the notice. If a hearing is requested, a hearing shall be conducted under [Section 6(d)]. The only matters for resolution at that hearing shall be whether the registrant has initiated and pursued appropriate action to comply with the condition or conditions within the time provided or whether the condition or conditions have been satisfied within the time provided, and whether the Administrator's determination with respect to the disposition of existing stocks is consistent with this Act. A decision after completion of such hearing shall be final. Notwithstanding any other provision of this Section, a hearing shall be held and a determination made within 75 days after receipt of a request for such hearing.

The Notice of Intent to Cancel provided that any hearing held pursuant to the Notice would follow the provisions set forth in 40 CFR Part 164. Section 164.91 provides that the Administrative Law Judge may render an Accelerated Decision in favor of Respondent as to all or any portion of a proceeding, "including dismissal without further hearing or upon such limited additional evidence . . . as he may receive" under a number of listed circumstances, including:

1) Untimely or insufficient objections filed pursuant to Section 164.20;

... ..

3) Failure to comply with prehearing orders;

... ..

6) Failure to state a claim upon which relief can be granted...

7) That there is no genuine issue of any material fact and that the Respondent is entitled to judgment as a matter of law; or

8) Such other and further reasons as are just.

DISCUSSION

It is clear from the language of the Notice of Intent to Cancel that it was issued because of Tull's failure to comply with the condition of its registration requiring the timely submission of data pursuant to the November 22, 1985, data call-in and because of Tull's failure to meet the conditions set by the Agency in its offer of December 17, 1987, to extend the deadlines for compliance with the 1985 data call-in. As noted above in the quoted Section of the statute the sole issues for hearing are whether Tull failed to comply with a condition of its conditional registration and whether the Administrator's determination with respect to existing stocks is consistent with the purposes of the statute.

It is clear from a reading of the Request for Hearing submitted by the above named Petitioners that none of these two (2) issues were addressed at all and therefore on that basis alone it is my judgment that the Motion to Issue an Accelerated Decision in the favor of Respondent is warranted. I will however address the specific arguments made by the Petitioners in so much as they are relevant to the issued remaining before me.

The issued raised by the remaining two (2) Petitioners in this matter, the California and Colorado Farm Bureau Federations, only raised the issues of the economic loss that will fall upon ranchers and farmers in the effected states and that the proposed cancellation will adversely effect public health because of an asserted increase in disease carrying animals. No where in these petitions is it alleged that Tull has complied or attempted to comply with the conditions of the conditional

registrations. Nor is it asserted anywhere that despite Tull's failure to comply with the terms of its conditional registration the Administrator's decision on existing stocks is inconsistent with the purpose of the Act. As suggested above, these Petitioners have failed to raise any relevant issue in their request for hearing.

Although it is true that the California Grape and Tree Fruit League argues in their petition that EPA wrongly refused to consider low-volume, minor-use exemptions from data requirements for 1080 registrations and that the California Department of Food and Agriculture has committed to provide data to support 1080 registrations. The California Cattlemen's Association also raised this issue. These issues will not be addressed for several reasons, not the least of which is that the arguments presented are insufficient to support a hearing under Section (e) and for the further reason that these two (2) original Petitioners have been dismissed from this action and therefore their arguments on these issues and not before me. It should also be noted that Tull never challenged any of the applicable data requirements and never requested low-volume exemption from those requirements and accepting its conditional registration, committed to meet the data requirements.

Although several of the Petitioners, including the California Department of Food and Agriculture, committed to provide the data required at this time, neither of those entities have submitted any additional data whatsoever that would meet the requirements of the statute and regulations.

In the face of the failure of any Petitioner to challenge the basis Notice of Intent to Cancel and the sufficiency of the facts asserted in

the Notice to support a cancellation under Section 6(e), it is clear that there are no material facts in dispute in this proceeding and that the Respondent is at this juncture entitled to judgment in its favor as a matter of law and that Respondent is therefore entitled to an Accelerated Decision pursuant to 40 CFR Section 164.91(7).

Although I am of the opinion that the Respondent's Motion for an Accelerated Decision is warranted under the facts in this matter, I will address the specific arguments raised by the remaining two (2) Petitioners in their Brief in Opposition to Respondent's Motion for an Accelerated Decision.

Although none of the Petitioners assert that either Tull or any other person submitted sufficient data to EPA to satisfy the terms of the conditional registration in a timely manner or that the conditional registration granted to Tull require that certain specific data be submitted to EPA on January 18, 1987, or April 18, 1987. In their Brief the two Farm Bureaus did not challenge the above-mentioned factual situations relied upon by EPA but rather they challenge the fundamental legal interpretation upon which EPA's Motion is founded. The Farm Bureaus argue that the issue for hearing pursuant to Section 6(e) in this case is not whether the conditions of the registration were met in a timely manner but rather whether or not reasonable efforts were made to comply with the conditions by either Tull or any of the other interested parties involved in this proceeding. In support of their argument that good faith efforts were in fact made to meet the conditions of Tull's registration the Bureaus allege that EPA kept changing the 1080 data requirements thereby making compliance impossible and that compliance was

made more difficult here because the data generators were state agencies and they therefore have difficulty in raising the funds required to generate the data required and therefore should for that reason be given some additional leeway.

On the issue of the relevancy of good faith attempts made on the part of the Petitioners to comply with the Agency's required data information, the Bureaus rely on the language contained in Section 6(e)(1) of the Act which states that the Administrator may issue a Notice of Intent to Cancel under Section 3(c)(7) of the Act if at any time during the period provided for satisfaction of any condition imposed determines that the registrant has failed to initiate and pursue appropriate action toward fulfilling any condition imposed. That language when read alone would suggest that the language mentioning "initiate and pursue appropriate action" would suggest that good faith efforts on the part of any person to provide the required data would forestall the Agency from cancelling the conditional registration. That argument however must fail because the next portion of the above-cited statute provides that at the end of the period provided for satisfaction of any condition imposed, if that condition has not been met the Administrator is entitled to issue a Notice of Intent to Cancel. In the instant case the Notice of Intent to Cancel was made after the expiration of the time allowed by the most recent extension granted by EPA and thus it does not fall under the portion of the statute relied upon by the Petitioners which suggest that good faith efforts may be considered. Such consideration of good faith efforts are only arguably involved if the Notice of Intent to Cancel was issued during the period provided for the satisfaction of any condition

imposed. Since the Notice of Intent to Cancel in this case was issued after the period for the submission of data had expired the Notice of Intent is not conditioned in any way and may be authorized for the issuance of such a Notice at the end of the period provided for satisfaction of any condition imposed and does not of course mention any matter concerning the taking of appropriate steps or any other interpretation which could be generally regarded as good faith efforts to comply. Under the facts in this case I am therefore of the opinion that the good faith argument presented by the Petitioner, Farm Bureaus is not well founded and cannot be sustained on that basis.

In conclusion it should be stated that Section 6(e) contemplates two (2) separate grounds for cancellation of a conditional registration. One (1) comes into play before the deadline for satisfying condition of the registration as passed. A registration can be cancelled if the registrant is not making adequate progress toward the satisfying the terms of the condition. The other instance occurs after the time period for satisfying the condition has expired in which case the conditional registration can be cancelled if the conditions have not been met. In this case it is the second ground for cancellation that is the determining factor as a Notice of Intent to Cancel makes very clear. In this case the Agency is seeking to cancel Tull's registration because neither Tull nor any other person has satisfied in a timely manner the conditions of the conditional registration establishing a schedule for the submission of the required data.

At this juncture, it may be appropriate to point out that at the prehearing conference held in early January of this year a representative

of Tull appeared and stated for the record that the total sales of that corporation for Compound 1080 only amounted to \$10,000.00 per year and that in as much as the generation of the required data would cost several million dollars, it was not in their judgment a worthwhile venture in that it never intended to nor does it intend in the future to generate any additional data concerning this pesticide since it is not worth the time and effort involved.

In addition to the good faith argument they also argue that since EPA kept changing the 1080 data requirements they made compliance with such requirements virtually impossible and that the Agency made an untimely denial of waiver requests made by various persons in addition to the low-volume, minor-use data exemptions which have been addressed. The above-mentioned arguments in my judgment should be characterized as objections to the terms of the conditional registration itself and not a valid argument in opposition to the intent to cancel which is the subject of this proceeding. As noted above, not only did Tull not supply any of the data which the Agency required to be submitted but it also did not make any legal challenge to the terms of the conditions of registration. The Agency argues that such objections and challenges while available to Tull if made in a timely manner, which in this case they were not, that such authority does not extend to other parties and that therefore the Farm Bureaus lack standing to challenge a lawful condition of some other persons registration to which that other party has agreed. I concur with the Agency's arguments on this point. Even if one were to accept, for the sake of argument, that this is the proper form for consideration of the acceptability of the conditions in Tull's registration, and if other

parties were able to raise such challenges they would at this juncture be equitably estopped from raising such objections at this time since the time to have made such objections has long passed.

As discussed above, the Farm Bureaus argue that EPA kept changing the applicable data requirements and therefore the opportunity for persons other than the registrant to file the required data was made virtually impossible on the theory of the "ever changing target" argument. In this case although some new requirements were added some of the original requirements were subsequently waived. The Respondent argues that the fact that some original requirements were waived would hardly excuse registrants from complying with the other existent requirements. The Agency also points out that new requirements always contained separate deadlines for the submission of such data requirements and should not have impacted on anyone's compliance with early requirements. The Agency always has the authority and responsibility under FIFRA to require additional data when such data are necessary to support continued registration. The Agency likewise has the authority to either waive or withdraw other requirements when they feel they are not necessary to support continued registration. On the equitable estoppel issue the Agency argues that while the changes alluded to by the Farm Bureaus would not constitute an excuse for any registrant, it should be pointed out that Tull received its conditional registration in November 1986, after a number of the changes cited by the Bureaus was in non-compliance also in January 1987, before the other changes occurred. It is therefore the Agency's opinion that the time for any person to challenge the conditions of the registration have long passed and the arguments as to changes made

are not relevant to this proceeding. I agree and adopt the reasoning expressed by the Respondent in this matter as being consistent with the language of the statute and regulations and with the intent of Congress when it enacted the statutes at issue here.

The other argument put forth by the Farm Bureaus had to do with the notion that because the data generator were state agencies which have trouble securing funding that they should therefore be afforded some special status under the law and regulations. As pointed out by the Agency, there is nothing in FIFRA which exempts state agencies from otherwise applicable data requirements and as a matter of fact the purpose of requiring data pursuant to Section 3(c)(2)(b) of FIFRA is to allow the Agency to accomplish its statutory responsibility of determining whether a pesticide continues to meet the standards for registration and that this responsibility is not lessened by the fact that the registrant happens to be a state agency. The Respondent also points out that the registrant, in this case is not a state agency and while EPA has no objections to other persons submitting data for Tull the ultimate responsibility for the data generation falls upon Tull and that being a private company no special consideration can be given to persons other than the registrant simply because of their particular situation as an agency of a state government. It should also be noted that the Farm Bureaus involved as well as many of the other Petitioners in this case which have been dismissed are not state agencies and therefore this argument only applies to one (1) or two (2) of the Petitioners and not to the majority of them.

The Farm Bureaus also assert that EPA took an excessive length of time in 1988 to deny the waiver request filed. In addressing that issue,

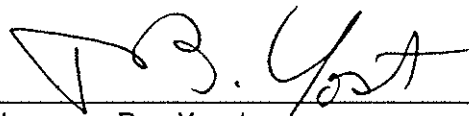
it should be noted that the conditional registration was issued in November of 1986, and the data were due in early 1987. The waiver request cited by the Farm Bureaus was not submitted until March 1988, well after the time for complying with the condition of registration expired. Additionally, the Agency in exercising its discretion to offer a conditional extension of time on November 17, 1987, no one including the registrant satisfied the conditions for the extension. Therefore far as Tull's registration is concerned, the waiver request was well out of time and was not submitted properly in response to the Agency's invitation in 1987. The Farm Bureaus argue that the Agency invited the waiver request in December 1987, and that the California Farm Agency dutifully responded. However the Farm Bureaus and the California Department of Food and Agriculture failed to differentiate between the December 15, 1987, data call-in for environmental fate data and the December 17, 1987, offer of an extension of time. The December 15, 1987, call-in imposed four (4) new requirements on registrants. Those requirements are found on page 4 of Respondent's exhibit E. This new data call-in did not require registrants to submit a waiver request if such request were deemed proper. However the March 1988, California Department of Food and Agriculture request of a waiver of one (1) of the four (4) requirements was contained in the December 15, 1987, data call-in. However California Department of Food and Agriculture also at that time requested numerous waivers of requirements not contained in the December 15, 1987 call-in but rather in the December 17, 1987, conditional offer of an extension of time. The extension offer applied to data requirements imposed long before December 1987, and that offer did not contain an invitation to submit a waiver.

request. Such waiver request would have been due when the requirements were originally imposed several years earlier. The later offer of an extension of time for submitting overdue data was contingent upon a commitment by registrants to generate that data and therefore waiver requests were not a proper response. Since the extension of time granted to Tull a great majority of the waiver requests submitted in 1988 were grossly out of time and did not constitute an excuse for not generating any required data.

CONCLUSION

At the above-mentioned prehearing conference held January 10, 1989, there in addition to the two (2) Farm Bureaus was a representative of the United States Department of Agriculture which expressed some interest in this matter and stated that if it were allowed to and if sufficient money was appropriated by Congress it might assist in the generation of the data required by the Agency in its notifications. The Farm Bureaus also argued that it was, along with the California Agricultural Department, interested in this matter and could possibly assist in the generation of the data required and asked whether the Agency was willing to negotiate a potential settlement of this matter in view of their offers to provide the data at some point in the future. The Agency responded that they had no wish to discuss settlement in the context of this matter but would however be willing to sit down with the Petitioners and the other organizations at some time in the future to discuss the generation of the required data.

Based on the record before me and the requirements of the statute and regulations, I'm of the opinion that the Motion for an Accelerated Decision in the favor of the Respondent, EPA, should and is hereby granted. Since the granting of this motion disposes of all the issues before it will constitute a Final Decision in this matter pursuant to regulation.



Thomas B. Yost
Administrative Law Judge

Dated: 2/21/89