UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
Rhee Bros., Inc.,	)	Docket No. FIFRA-03-2005-0028
	)	
RESPONDENT	)	
	)	

ORDER GRANTING MOTION FOR ACCELERATED DECISION AND RESCHEDULING HEARING

I. Introduction and Procedural Background

This proceeding, under Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a)(1), was commenced on January 25, 2005, by the filing of an Administrative Complaint by the Associate Director for Enforcement, Waste and Chemicals Management Division, United States Environmental Protection Agency, Region III ("EPA" or "Complainant"), charging Respondent, Rhee Bros., Inc., with the distribution and sale of unregistered pesticides in violation of FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), and associated regulations codified as 40 C.F.R. §§ 150-189. Specifically, the Complaint alleges, in a single count, that from January 2000 through July 2003, Respondent sold and/or distributed approximately 469 units of the unregistered pesticide identified as "JOMYAK (naphthalene), OXY" 12514K, 12515K, and/or 12519K ("JOMYAK").[1] While the Complaint did not propose a specific monetary penalty, it did assert that each sale or distribution of an unregistered pesticide constitutes a separate violation of FIFRA for which a civil penalty up to $5,000, as adjusted for inflation, may be assessed pursuant to FIFRA section 14(a)(1), 7 U.S.C. § 136*l*(a)(1).

[1] "JOMYAK" is apparently the product name and "OXY" is the name of the product's Korean manufacturer. The numerical references of "12514K, 12515K, and/or 12519K" refer to different size packaging of the same product. *See*, Exhibits E and F to Complainant's Prehearing Exchange (hereinafter cited as "C's PHE Ex. __"). "Naphthalene" tablets of the type at issue here (CAS #91-20-3) are commonly referred to as "mothballs." *See*, C's PHE Ex. F (Material Safety Data Sheet).

Respondent, through counsel, filed an "Answer to Complaint" on February 25, 2005, admitting that it was a corporation and a "person" under FIFRA section 2(s), 7 U.S.C. §136(s), and that it owned and operated an Asian wholesale grocery business headquartered at 9505 Berger Road in Columbia, Maryland. Respondent further admitted that on February 2, 2004, the Maryland Department of Agriculture (MDA) conducted an inspection of its headquarters during which MDA collected computerized records prepared by Respondent memorializing the sale by Respondent of approximately 469 units of JOMYAK, between January 2000 through July 2003. Respondent denied knowledge as to whether JOMYAK was a pesticide and whether it was registered as such with EPA. Respondent further entered a "general denial of liability" and raised three affirmative defenses (1) that the Complaint fails to state a claim upon which relief may be granted; (2) that the Complaint is barred by the applicable statute of limitations; and (3) that EPA has failed to join a necessary party.

Pursuant to a Prehearing Order issued on May 23, 2005, both parties submitted their Prehearing Exchanges. In its Initial Prehearing Exchange, Complainant included documentary and narrative support for its assertion that JOMYAK is an unregistered pesticide and proposed a penalty of $1,316,700 based upon 266 separate distributions of JOYMAK assessed at $4,950 per distribution. In its Prehearing Exchange, Respondent withdrew its three affirmative defenses but asserted a number of grounds upon which it believed the proposed penalty should be reduced including that the violation was unintentional, that its net profits on the sales totaled only approximately $1,126.32, and that no one was harmed by any of the products in question. Complainant subsequently submitted a rebuttal Prehearing Exchange objecting to one of Respondent's proposed witnesses.

On August 18, 2005, Complainant filed a Motion for Accelerated Decision as to Liability asserting that there is no genuine issue of fact that: 1) Respondent is a person; 2) who has distributed or sold; 3) a pesticide; 4) that is not registered under FIFRA Section 3, 7 U.S.C. § 136a. *See*, page 9 of Complainant's Brief in Support of Complainant's Motion for Accelerated Decision (hereafter cited as "C's Brief"). It further argued that FIFRA is a strict liability statute and the arguments Respondent raised in its Prehearing Exchange, while potentially relevant to the penalty, cannot serve to defeat liability. *Id.* Respondent filed its Response to Complainant's Motion for Accelerated Decision on or about September 9, 2005 in which it claimed that since EPA was asserting a penalty based upon only 266 violations, it should be "estopped" from asserting 469 violations for the purposes of determining the extent of its liability. Further, Respondent asserted that it was "unaware of any registration requirement for the common household product of mothballs at issue" prior to the MDA inspection because neither the U.S. Food and Drug Administration, Respondent's customs broker, its Korean supplier, or product's manufacturer notified it that the product was required to be registered with EPA. Complainant subsequently filed a Reply to Respondent's Response wherein it reduced the number of violations on which it seeks a determination of liability by two (2), from 469 to 467, based upon statute of limitations grounds.

II. Standard for Accelerated Decision

This proceeding is governed by the Consolidated Rules of Practice, 40 C.F.R. Part 22. Section 22.20(a) of the Rules authorizes the Presiding Officer "at any time [to] render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." 40 C.F.R. § 22.20(a). The standard for granting a motion for accelerated decision is analogous to that of a motion for summary judgment under the Federal Rules of Civil Procedure. *Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997); *CWM Chem. Serv.*, 6 E.A.D. 1, 12 (EAB, 1995). In deciding such motions, the evidence must be viewed in a light most favorable to the non-moving party. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970). However, to defeat summary judgment the opposing party must not only raise an issue of material fact, but that party must demonstrate that this dispute is "genuine" by referencing probative evidence in the record, or by producing such evidence. *Green Thumb Nursery, Inc.*, 6 E.A.D. at 793. Summary disposition may not be avoided by merely alleging that a factual dispute may exist or that future proceedings may turn something up. *Id.* Thus, Respondent cannot defeat a factual allegation well supported in the record by merely alleging a lack of information as to its accuracy.

III. Statutory and Regulatory Provisions

FIFRA section 12(a)(1) provides in pertinent part:

> Except as provided in subsection (b) of this section, it shall be unlawful for any person in any state to distribute or sell to any person –
>
> (A) any pesticide that is not registered under section 136a of this title . . .

7 U.S.C. § 136j(a)(1)(A).

FIFRA section 2(u), in turn, provides in pertinent part that:

> The term "pesticide" means (1) any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest[2] . . .

7 U.S.C. § 136(u).

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[2] FIFRA § 2(t), 7 U.S.C. § 136(t), provides that: The term "pest" means (1) any insect, rodent, nematode, fungus, weed, or (2) any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-organism (except viruses, bacteria, or other micro-organisms on or in living man or other living animals) which the Administrator declares to be a pest under section 136w(c)(1) of this title.

Additionally, the implementing regulation to FIFRA section 2(u), provides in pertinent part:

> A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:
>
> > (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise):
> >
> > > (1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide;
> >
> > * * *
> >
> > (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used or is intended to be used for a pesticidal purpose.

40 C.F.R. § 152.15.

Consistent with the foregoing, it has been held that a product is a "pesticide" within the meaning of FIFRA, if the person selling or distributing the product makes pesticidal claims. *N. Jonas & Co. Inc.*, 1978 EPA ALJ LEXIS 3, at * 28-29 (ALJ, July 27, 1978), *aff'd*, 666 F.2d 829 (3rd Cir. 1981).

FIFRA section 2(gg) defines the term "to distribute or sell" as meaning "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." 7 U.S.C. § 136(gg).

The regulation at 40 C.F.R. § 152.3(j), implementing Section 2(gg), also provides that the term "distribute or sell" means 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."

IV. DISCUSSION

As indicated above, Respondent has admitted being a "person" under FIFRA, having a headquarters for its wholesale, retail and/or distribution business in the State of Maryland,[3] and that from January 2000 through July 2003, it sold approximately 469 units of JOMYAK. However, Respondent indicated in its Answer that it has "no knowledge" with regard to the allegations that JOMYAK is a "pesticide" or "pesticide product" as defined by Section 2(u) of FIFRA, 7 U.S.C. §136(u) and 40 C.F.R. § 152.3 (Complaint, ¶ 12) or that "[a]t all times relevant to this Complaint, the pesticide product "JOMYAK (naphthalene), OXY" was not registered with EPA, and has never been registered with EPA." (Complaint, ¶ 22). As such, Respondent is essentially putting Complainant to its proof with regard to these elements.[4]

In support of the accuracy of the truth of these two allegations as to which Respondent lacks information, Complainant has proffered a number of exhibits. Among those exhibits is a photograph of the packaging of the product at issue, which shows that it was sold in partially see-through cellophane bags bearing a cartoon picture of a hippopotamus wearing boxing gloves on the front and printed labeling on the front and back almost exclusively in the Korean language.[5] C's PHE Ex. 1 and C's Brief, Att. 1. A certified Korean-English translation of the package labeling indicates that the product name translates literally as "Moth-Eating Hippopotamus" and that the labeling on the package further identifies it as "Naphthalene Insecticide," "Product name: Insecticide," "Contents: Naphthalene." *See*, C's PHE 13. Pictures on the packaging suggest placement of the product in boxes and drawers containing clothes, suitcases and in toilets. *Id.* Complainant has also submitted into the record the Affidavit of Daniel Peacock, a biologist with EPA's Office of Pesticide Programs, Registration Division, wherein Mr. Peacock opines, *inter alia*, that the labeling on the package makes pesticidal claims. In that under FIFRA a "pesticide" is defined as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest (FIFRA § 2(u)); moths are insects and thus pests (FIFRA 2(t)); the terms "eating" and "insecticide" imply preventing, destroying, repelling or mitigating, and a product's function or purpose may be gleaned from its label or accompanying literature (40 C.F.R. §152.15), it is concluded that "JOMYAK (naphthalene), OXY" is a pesticide. Further, it is clear from the packaging that Respondent sold JOMYAK, the substance at issue, claiming that it can or should be used as a pesticide and/or with knowledge that it would be used or was intended to be used for a "pesticidal purpose" and that it was thus a pesticide requiring registration under 40 C.F.R. § 152.15.

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[3] While in its Answer it denied doing "retail" business, it withdrew such denial in its Initial Prehearing Exchange.

[4] Neither in its Prehearing Exchange nor in its Response to Complainant's Motion, did Respondent affirmatively deny the truth of these allegations or did it identify any evidence which would refute the accuracy of these allegations.

[5] The minimal labeling in English on the package states "MADE IN KOREA" and "OXY." *See*, C's PHE Ex. 1.

Further, Mr. Peacock's Affidavit opines that from January 2000 through July 2003, "JOMYAK (naphthalene), OXY" was not registered with EPA as a pesticide product under FIFRA. Respondent has put no evidence in the record bringing the accuracy of this sworn factual assertion into question.

As indicated above, Respondent raised two issues in response to Complainant's Motion for Accelerated Decision. One issue was that it was unaware of any registration requirement for the product at issue until February 2004, when the MDA inspected its facilities, at least in part because neither the U.S. Food and Drug Administration, its customs broker, the distributor, nor the manufacturer advised it of the registration requirements.[6]

However, as Complainant correctly points out in its Reply to Respondent's Response, Section 12(a)(1)(A) of FIFRA is a strict liability statute and therefore, defenses based upon lack of knowledge or intent to violate do not apply. *See*, *Micro Pen of U.S.A., Inc.*, 1999 EPA ALJ LEXIS 11 *9 (ALJ. March 22, 1999)(FIFRA is a strict liability statute, so a finding of fault or negligence on the part of a respondent is not necessary to a finding of liability under Section 12(a)(1)(A)); *Sultan Chemists, Inc*., 9 E.A.D. 323, 2000 EPA App. LEXIS 24 *59 (EAB, Sept. 13, 2000)(good faith cannot serve to defeat liability under a strict liability statute like FIFRA).[7] Therefore, while perhaps relevant to penalty, the fact that Respondent was unaware of the requirement to registered the products at issue and thus acted without knowledge that it was violating the statute or intent to do so, is immaterial to determining liability.

The second issue raised by Respondent in response to Complainant's Motion for Accelerated Decision is in regard to the number of violations for which Respondent may be found liable. Respondent argues that the number of such violations should be limited to 266 because that is the number of violations as to which Complainant represented in its Prehearing Exchange it was seeking a penalty. In reliance upon this representation by Complainant, Respondent states, it withdrew its statute of limitations defense raised in its Answer and therefore, Complainant should be "estopped" from seeking a liability determination on a greater

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[6] Respondent alleges that in 2001 the FDA became aware that it was importing OXY naphthalene because invoices listing the product were provided to it in connection with the FDA's exercise of regulatory authority to screen foreign products entering the country. Respondent notes that the FDA took regulatory action with regard to certain food products on the invoices, but not with regard to the OXY naphthalene.

[7] In *Sultan*, the Environmental Appeals Board noted that, although FIFRA is a strict liability statute, a seller or distributor *can escape liability* for unknowingly violating FIFRA section 12(a)(1)(A) *if* it can establish that has a valid written guarantee that the product was lawfully registered and otherwise meeting the requirements of FIFRA § 12(b)(1). Respondent has not alleged having such a guarantee in this case.

number of violations.[8] In its Reply to this Response, Complainant states only that in consideration of the statute of limitations issue, it is reducing the number of violations as to which it is seeking a liability determination from 469 to 467.[9]

The Complaint indicates that the figure of "469," as the approximate number of "units" of JOMYAK (naphthalene), OXY, Respondent sold/distributed from January 2000 through July 2003, came from Respondent's own computer generated sales records. In its Answer, Respondent did not deny accuracy of the number 469 except to "explain that the figure of '469 units' is an approximation." Further, Respondent included as attachment 6 to its Response to Complainant's Motion for Accelerated Decision copies of what appear to be the computerized sales records referred to in the Complaint. Those sales records indicate, for each size of the product at issue, the identity of the purchaser, date of purchase, and total quantity sold, apparently in units,[10] ("Q'ty" and "U/P" [unit price]). These records (also attached as C's PHE

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[8] FIFRA does not contain its own statute of limitations regarding administrative penalty actions for violations under 7 U.S.C. § 136*l*(a). Thus, the applicable statute of limitations is contained in 28 U.S.C. § 2462 and provides:

> Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty, or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

See, 3M Company v. Browner, 17 F.3d 1453, 1461 (D.C. Cir. 1994) (administrative proceedings brought by the Federal government for the assessment of penalties are an "action, suit or proceeding for the enforcement of any civil fine [or] penalty" to which the general statute of limitations in section 2462 applies) .

[9]Apparently, the original count included two sales which occurred in January 2000, but prior to the 25th day thereof, and since the Complaint was filed on January *25, 2005*, sales prior to January *25, 2000* would be time barred by the applicable 5 year statute of limitations (28 U.S.C. § 2462) and so Complainant amended its assertion accordingly, reducing violations for which it seeks liability to 467. *See*, Complainant's Reply to Respondent's Response, pp. 2-3. Further, the record indicates that violations allegedly continued from January 2000 only until July 2003, because OXY, the Korean manufacturer of JOMYAK "stopped exporting the mothballs to Rhee" at that point in time. *See*, Respondent's Response to Complainant's Motion, page 4.

[10] The record suggests that such "units" each contained 20 individual sales packages. See, C's PHE Ex. F (customer invoices indicating the sale of JOMYAK (naphthalene) "20x48 pcs [peices]" "u[nit]/price" "42.00" "E[ach item]/price" "2.10."

Ex. F) document that during the period at issue (January 25, 2000 through July 2003), Respondent sold 111 units of JOMYAK size 12519K; 180 units of JOMYAK size 12515K; and 176 units of JOMYAK size 12514K, for a total of 467 units.

In regard to calculating the number of violations in FIFRA cases, the Environmental Appeals Board has held that "under sections 12(a)(1)(A) and (E), the 'unit of violation' is the sale or distribution. *Each such sale or distribution of a pesticide to any person constitutes a distinct unit of violation, and thus is grounds for the assessment of a separate penalty*." *Chempace Corp*., 9 E.A.D. 119, 2000 EPA App. LEXIS 15 *27 (EAB 2000)(italics added). Therefore, the record *factually* supports finding Respondent liable for 467 alleged violations of FIFRA sections 12(a)(1)(A) for its sale of JOMYAK from January 25, 2000 through July 2003. However, Respondent argues that nevertheless the government is now "estopped" from obtaining liability for such number of violations because it relied upon Complainant's representations in its Prehearing Exchange to withdraw its statute of limitations defense.

Complainant's Prehearing Exchange filed June 17, 2005 proposes a penalty in this case of $1,316,700 and states that such penalty "was calculated pursuant to the five stage process described on page 18 of the FIFRA ERP. . . "[11] Relying upon the policy, Complainant proposes a penalty of $4,950 per violation and as to the number of violations it states:

> Each sale or distribution of the unregistered product "JOMYAK (naphthalene), OXY" constitutes a separate violation of FIFRA for which penalties may be assessed. In this case, Respondent made two hundred and sixty-six (266) separate distributions, involving either one or more of the three sizes/types of "JOMYAK (naphthalene), OXY," from January *2002* through July 2003. For penalty calculation purposes, EPA considers Respondent to have committed two hundred and sixty-six (266) independent violations of FIFRA. Because Respondent is charged with two hundred and sixty-six counts of violating FIFRA, the final penalty is calculated as follows:
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> **266 violations x $4,950 per violation = $1,316,700**

C's PHE at 13 (emphasis in original and added).

Thus, for penalty purposes, Complainant narrowed the period of violation as to which it would seek a penalty from the full five year period dating back from the date of the Complaint, *i.e*. January 25, 2000, to January *2002*, a three year period prior to the date the Complaint was filed, which consists of a one and a half year period of violation. Complainant gave no

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[11]The "FIFRA ERP" consists of EPA's "Enforcement Response Policy for Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)," dated July 2, 1990, as supplemented by the "Gravity Based Penalty Matrix for FIFRA Violations Which Occur After January 30, 1997," effective January 30, 1997. *See*, C's PHE, p. 9.

explanation as to the reason for its decision to narrow the period of violations as to which it would seek a penalty.

Estoppel is "an equitable doctrine invoked to avoid injustice in particular cases." The elements of the defense are (a) a definitive misstatement or omission of fact made by one party to another with reason to believe that the other will rely upon it; and (b) the other party does in fact reasonably rely upon the misrepresentation to his detriment. For the reliance to be reasonable, the party claiming the estoppel defense must show that at the time it acted to its detriment it did not have knowledge of the truth nor could such knowledge have been obtained with reasonable diligence. *Heckler v. Community Health Services of Crawford County, Inc.*, 467 U.S. 51, 58 (1984). The defense of estoppel is rarely valid against the Federal Government acting in its sovereign capacity. *OPM v. Richmond*, 496 U.S. 414 (1990); *Heckler*, 467 U.S. at 60-63 (1984). In *Heckler*, the Supreme Court explained that "when the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant." *Id.* at 60 (citations omitted). Therefore, not only must the proponent of the defense prove the traditional elements but to prevail against the Government it must prove affirmative misconduct by the government. *United States v. Marine Shale Processors*, 81 F.3d 1329, 1349 (5th Cir. 1996); *B.J. Carney Industries, Inc.*, 7 E.A.D. 171, 196 (EAB, 1997). Affirmative misconduct means an affirmative act of misrepresentation or concealment of a material fact. Mere negligence, delay, inaction, or failure to follow agency guidelines does not constitute affirmative misconduct. *Board of County Comm'rs v. Isaac*, 18 F.3d 1492, 1499 (10th Cir. 1994); *Fano v. O'Neill*, 806 F.2d 1262, 1265 (5th Cir. 1987). *See, United States v. Bloom*, 112 F.3d 200 (5th Cir. 1997) (mere assertions of inaction on the part of the Government to do not give rise to an estoppel defense).

There is no evidence that by indicating that it had decided to limit the number of violations as to which it was seeking penalty, Complainant committed any affirmative misconduct of misrepresentation or concealment of a material fact. Agencies have broad prosecutorial discretion in decisions about which cases to prosecute, what violations to allege, and what amounts of penalties to seek. *See, e.g., B&R Oil Co.*, 8 E.A.D. 39, 51(EAB 1998)("courts have traditionally accorded governments a wide berth of prosecutorial discretion in deciding whether, and against whom, to undertake enforcement actions"); *Butz v. Glover Livestock Comm'n Co.*, 411 U.S. 182, 187 (1973), *reh'g denied*, 412 U.S. 933 (1973)(the employment of a sanction within the authority of an administrative agency is . . . not rendered invalid in a particular case because it is more severe than sanctions imposed in other cases."). *See also, Newell Recycling Co., Inc.*, 8 E.A.D. 598, 642 (EAB 1999) ("penalty assessments are sufficiently fact- and circumstance-dependant that the resolution of one case cannot determine the fate of another."), *aff'd, Newell Recycling Co., Inc. v. EPA*, 231 F.3d 204, 210 n.5 and (5th Cir. 2000) (an administrative penalty need not resemble those assessed in other cases); *Cox v. United States Dept. of Agric*., 925 F.2d 1102, 1107 (8th Cir. 1991) (where a sanction is warranted in law and fact, it will not be overturned simply because it is more severe than sanctions imposed in other cases). Further, the EAB has noted that there are a "multiplicity of

factors that may impact a penalty determination. . . . the Agency must consider, among other things, the risks of litigation and the demands on the Agency's enforcement resources. The Agency must also consider such things as the size of the business involved, the ability of a company to pay a penalty, and any history of prior violations." *Titan Wheel Corporation of Iowa*, RCRA (3008) Appeal No. 01-03, 2002 EPA App. LEXIS 10 *20 (EAB, June 6, 2002), *aff'd, Titan Wheel Corp. v. United States*, 291 F. Supp. 2d 899 (S.D. Iowa 2003), *aff'd*, 113 Fed. Appx. 734, 2004 U.S. App. LEXIS 24330 (8th Cir. Nov 23, 2004). There have been numerous cases, where in light of those factors and perhaps others, the Agency has reduced or waived the penalty it sought against violators. *See e.g., Gordon Head and William Spangler*, EPA Docket No. TSCA-V-C-057-93, 1996 EPA ALJ LEXIS 30, 1-2 (ALJ, Nov. 20, 1996)(noting that upon review of certain additional financial records, the Agency elected to waive the penalty aspect of its complaint); *Mountain Pine Pressure Treating Co., Inc.*, EPA Docket No. RCRA-VI-503-H, 1986 EPA ALJ LEXIS 27 *2 (ALJ, Aug. 25, 1986)(based upon review of evidence submitted by Respondent, Agency decided to waive the assessment of any penalty in the matter); *John A. Capozzi d/b/a Capozzi Custom Cabinets*, RCRA (3008) Appeal No. 02-01, 2003 EPA App. LEXIS 2 *28 (EAB, March 25, 2003)(FIFRA case noting that EPA asserted that while it limited its penalty proposals to the 119-day period, its Amended Complaint did not similarly limit the periods of violation to that 119-day period.).

Moreover, in light of Complainant voluntarily reducing the number of violations alleged from 469 to 467 based upon statute of limitations grounds, there is no evidence that Respondent relied to "its detriment" on Complainant's decision to seek penalty on only 266 violations by withdrawing its statute of limitations defense. The only violations to which such defense could apply would be those allegedly committed prior to January 25, 2000, *i.e.* more than 5 years before the Complaint was filed since the applicable statute of limitations, 28 U.S.C. § 2462, provides that claims may be lawfully "commenced within 5 years from the date when the claim first accrued . . ." Such defense would not have limited this action to the 266 violations committed in the *three years* before this action was instituted and as to which Complaint seeks a penalty. Therefore, the record does not support Respondent's claim that Complainant is "estopped" from seeking liability on the full number of violations supported by the record.

Thus, there is no dispute of material fact that Respondent sold or distributed 467 units of unregistered pesticide products as alleged in the Complaint. Complainant is therefore entitled to and will be granted an accelerated decision finding Respondent liable for 467 violations of FIFRA section § 12(a)(1)(A).

V. Rescheduling Hearing

Hearing in this matter is currently set to begin on November 29, 2005. Due to a scheduling conflict, the undersigned is no long available to preside over the hearing on that date. Therefore, the hearing is being postponed one week and is hereby being rescheduled to begin on Tuesday, December 6, 2005 in Columbia, Maryland.

ORDER

A. Complainant's Motion for Accelerated Decision as to Liability is hereby **GRANTED**.

B. Respondent is found liable for 467 violations of FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A).

C. The hearing on the matter of the penalty to be imposed for the violations is hereby rescheduled and will now begin on December 6, 2005 in Columbia, Maryland, continuing if necessary, on December 7-9, 2005. The Regional Hearing Clerk will make appropriate arrangements for a Courtroom. The parties will be notified of the exact location and of other procedures pertinent to the hearing when those arrangements are complete.

Individuals requiring special accommodations at the hearing, including wheelchair access, should contact the Regional Hearing Clerk, as soon as possible so that appropriate arrangements can be made.

THE RESPONDENT IS HEREBY ADVISED THAT FAILURE TO APPEAR AT THE HEARING, WITHOUT GOOD CAUSE BEING SHOWN THEREFOR, MAY RESULT IN A DEFAULT JUDGMENT BEING ENTERED AGAINST IT.

IF EITHER PARTY DOES NOT INTEND TO ATTEND THE HEARING OR HAS GOOD CAUSE FOR NOT BEING ABLE TO ATTEND THE HEARING AS SCHEDULED, IT SHALL NOTIFY THE UNDERSIGNED AT THE EARLIEST POSSIBLE MOMENT.

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Susan L. Biro
Chief Administrative Law Judge

Date: September 27, 2005
Washington, D.C.