

2/7/96

11

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Andrew J. Allen d/b/a)	Docket No. IF&R-04-94FO44-C
Allen Chemical Company,)	
)	
Respondent)	

ORDER GRANTING MOTION FOR PARTIAL ACCELERATED DECISION

This matter arises under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et. seq.* The United States Environmental Protection Agency ("EPA") has filed a motion for partial accelerated decision on the issue of liability for the three alleged FIFRA violations involved in this case. Respondent, Andrew J. Allen d/b/a Allen Chemical Company ("Allen Chemical"), has not filed a response to EPA's motion. For the reasons that follow, EPA's motion for partial accelerated decision is granted.

Allen Chemical is charged with three counts of violating Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). EPA claims that respondent violated FIFRA by distributing a pesticide, "Allen Root Control", which was not registered pursuant to Section 3(a) of that statute. 7 U.S.C. § 136a(a). Count I is based upon the sale of Allen Root Control to the Water and Wastewater Department, City of Avon Park, Florida, on March 24, 1993. Count II involves a May 28, 1993, sale of Allen Root Control to the City of Piedmont, Water, Gas, and Sewer Board, Piedmont, Alabama, and Count III involves a June 1, 1993, sale of this product to the Sylacauga Housing Authority, in Sylacauga, Alabama. See Compl. Pre. Ex. Exhs. 7(a), 7(b), 10(b), 10(c), 13(a) & 13(b).

Allen Chemical's position is that Allen Root Control is an "obstruction remover" and not a pesticide. See Resp. Answer. It argues, therefore, that FIFRA registration is not required for this product. Allen Chemical additionally seeks to avoid liability on the ground that it does not manufacture Allen Root Control, but instead operates as a "jobber/distributor of chemical products on a drop shipment basis." *Ibid.*

EPA does not take issue with Allen Chemical's description of its product or the respondent's characterizing itself as a "jobber/distributor". Rather, EPA submits that the statutory provisions of FIFRA were intended to encompass the type of product involved here, Allen Root Control, as well as the type of commercial activity engaged in by Allen Chemical. EPA is correct.

Section 2(u) of FIFRA defines the term "pesticide" as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest"

7 U.S.C. § 136(u). Section 2(t) of FIFRA in turn states that what exactly is a "pest" can be determined by the Administrator after notice and opportunity for a hearing. The Administrator made such a determination in 40 C.F.R. § 152.5, which states in part that an organism is a pest under circumstances deleterious to the environment if it is:

(c) Any plant growing where not wanted, including any moss, alga, liverwort, or other plant of any higher order, and any plant part such as the root

Emphasis added.

The provisions of 40 C.F.R. § 152.5 are also consistent with the statutory language of Section 2(u) (2) of FIFRA which further defines the term "pesticide" to include "any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant" 7 U.S.C. § 136(u)(2). See Chattahoochee Research Company, IF&R Docket No. IV-254-C (January 11, 1978)(Product which penetrated to roots to clean away unwanted mildew, mold, fungus, and moss held to be subject to FIFRA); see also, Haveman Grain Company, Inc., IF&R Docket No. VII-1211C-93P (July 7, 1995), at p. 7.

As measured against the preceding definition, it is clear that Allen Root Control is a pesticide under FIFRA. In that regard, the label on Allen Root Control in part states that "Root Control provides a simple and inexpensive means of removing from sewers the roots of trees and shrubs which have penetrated the joints of underground conduits in their search for food and water." Compl. Pre. Ex. Exh. 10(e).

Accordingly, Allen Chemical was required to register Allen Root Control as a pesticide pursuant to Section 3(a) of FIFRA. Allen Chemical's sale and/or distribution of this unregistered pesticide constitutes a violation of Section 12(a)(1)(A) of FIFRA as alleged in Counts I, II, and III, of EPA's complaint.

The hearing scheduled in this matter for February 21, 1996, in Birmingham, Alabama, will involve only the civil penalty amount to be assessed against Allen Chemical for the three Section 12(a)(1)(A) FIFRA violations.

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

Issued: February 7, 1996
Washington, D.C.

IN THE MATTER OF ANDREW J. ALLEN d/b/a ALLEN CHEMICAL COMPANY
Respondent
Docket No. IF&R-04-94F044-C

Certificate of Service

I certify that the foregoing Order Granting Motion for Partial Accelerated Decision, dated February 7, 1996, was sent this day in the following manner to the below addressees.

Original by Regular Mail to:

Ms. Julia Mooney
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 4
345 Courtland Street, N.E.
Atlanta, GA 30365

Copy by Regular Mail to:

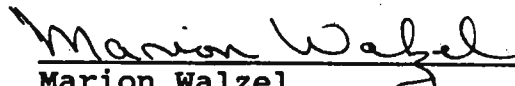
Attorney for Complainant:

Linda Carney Crum, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region 4
345 Courtland Street, N.E.
Atlanta, GA 30365

Copy by Registered Mail,
Return Receipt Requested
and by Regular Mail:

Attorney for Respondent:

Andrew J. Allen
Allen Chemical Company
P.O. Box 100211
Birmingham, AL 35210



Marion Walzel
Legal Staff Assistant

Dated: February 7, 1996