

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of

E. I. du PONT de NEMOURS and CO. Docket No. FIFRA 95-H-11

Respondent

ORDER GRANTING COMPLAINANT'S MOTION TO AMEND COMPLAINT
GRANTING RESPONDENT'S MOTION FOR ACCELERATED DECISION
AND DISMISSING COMPLAINT, AND DENYING COMPLAINANT'S
MOTION FOR ACCELERATED DECISION

BACKGROUND

This proceeding began with an original Complaint and Notice of Opportunity for Hearing filed on May 26, 1995, by Complainant ¹ (1995 Complaint). The 1995 Complaint alleges that Respondent ² violated:

FIFRA Section 12 (a)(1)(C), 7 U.S.C. § 136j (a)(1)(C), and FIFRA Section 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), inasmuch as it did distribute or sell the pesticides, DUPONT BENLATE 50 DF FUNGICIDE, DUPONT BENLATE FUNGICIDE and OLYMPIC BENOMYL 50 DF with compositions that differed from the compositions described in the statements required in connection with their registration and without necessary directions for use or warning or caution statements.

1995 Complaint at 1.

Respondent's Answer was filed on June 19, 1995. In the Answer, Respondent denied all of Respondent's allegations and requested a hearing. Subsequently, on July 26, 1995, Respondent filed a Motion for Summary Judgment. In response, Complainant filed a pleading on August 9, 1995 opposing Respondent's July 26, 1995 motion and requesting an accelerated decision on all outstanding issues. On August 18, 1995, Respondent filed a pleading (1) requesting leave to reply to that portion of Complainant's August 9, 1995 pleading which opposed Respondent's July 26, 1995 motion for summary judgment and (2) opposing Complainant's August 9, 1995 motion for accelerated decision. on August 29,

1995, Complainant filed an opposition to Respondent's August 18, 1995 motion for leave to file a reply. On September 7, 1995, Respondent filed a response to Complainant's August 29, 1995 pleading. Complainant responded to Respondent's September 7, 1995 pleading by a pleading filed September 12, 1995. These matters are still pending before the undersigned.

In separate, but related matters, Complainant filed a motion to amend its complaint, along with an amended complaint, on August 31, 1995. Respondent filed an answer requesting that action on Complainant's motion be deferred until Respondent's motion for summary judgment was acted upon. By order issued July 30, 1996, the undersigned denied Respondent's request and set a date for Respondent to file an answer to Complainant's motion to amend. On September 6, 1996, Respondent filed an answer to Complainant's motion to amend urging (1) that Respondent's pending motion for summary judgment be granted and that (2) Complainant's motion to amend be denied. Complainant filed a response to that pleading on September 20, 1996. Respondent filed a response to Complainant's September 20, 1996 pleading on October 2, 1996.

For the reasons set forth below, Complainant's motion to amend the complaint shall be granted. In addition, Respondent's motion for summary judgment is granted for the reasons set forth below. Complainant's motion for accelerated decision is denied.

DISCUSSION

Motion to Amend Complaint

In the 1995 Complaint, Counts I through XIX allege that Respondent distributed or sold the pesticide, DuPont Benlate 50 DF, the composition of which differs from its composition as described in the statement required in connection with its registration, which violates FIFRA Section 12(a)(1)(C), 7 U.S.C. § 136j (a) (1)(C). Similar allegations were made with respect to the pesticide DuPont Benlate Fungicide (Counts XX-XXII) and the pesticide Olympic Benomyl 50 DF (Count XXIII). Count XXIV alleged that Respondent distributed or sold Olympic Benomyl 50 DF without necessary directions for use and adequate warnings and precautions in violation of FIFRA § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E). The total proposed penalty is \$120,000.

In its proposed amended complaint, Complainant would add alternative legal grounds for the violations pled in the original complaint. More specifically, for Counts I-XXII, Complainant alleges as an alternative basis for each count,

a violation of Section 12 (a) (1) (E) of FIFRA, 7 U.S.C. § 136j (a) (1) (E) , which provides that it is unlawful to distribute or sell "any pesticide which is adulterated or misbranded."

Good cause has been demonstrated to grant the motion to amend the complaint. The primary justification for this ruling is that Respondent's motion for summary judgment (which, as noted below, shall be treated as a motion for accelerated decision) is granted in this order. Accordingly, all of the facts must be viewed in the manner most favorable to Complainant. Consistent therewith, it is important that all of Complainant's arguments be considered prior to granting Respondent's motion for accelerated decision. Further, the motion to amend the complaint is consistent with applicable case law. Forman v. Davis, 371 U.S. 178 (1962); In the Matter of San Antonio Shoe, Inc., Docket No. EPCRA-VI-501-5, Order Granting Motion to Amend Complaint (April 2, 1992). Accordingly, the motion to amend the complaint is granted. In light of the action taken herein, there is no need to provide for a formal answer to the amended complaint by Respondent.

Respondent's Motion for Summary Judgment

Respondent's motion for summary judgment is, in effect,, a motion for accelerated decision governed by 40 C.F.R. § 22.20. For the reasons set forth below, it shall be granted.

Section 12 (a) (1) of FIFRA § 136j (a) (1) provides that "...it shall be unlawful for any person in any State to **distribute** or **sell** to any person . . ." various types of pesticides, as noted in the summation of the complaint, as amended. Therefore, the preliminary question to be answered is whether the various pesticides that were sampled, and are the subject of this proceeding, fall within the definition of "distribute or sell." If they do not, there is no need to consider all of the other arguments raised by the parties.

In a related section of FIFRA, Congress defined the term as follows:

(gg) To Distribute and Sell. --- The term "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.

FIFRA Section 2(gg), 7 U.S.C. § 1365(gg).

The language of the implementing regulation is similar:

Distribute or sell and other grammatical variations of the term such as "distributed or sold" and "Distribution of sale," 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.

40 C.F.R. § 152.3.

The facts are uncontroverted. Both parties agree that:

(1) Respondent is a "person" as defined by FIFRA Section 2 (s) 7 U.S.C. § 136(s) and is therefore subject to the act;

(2) Respondent is a "registrant" as defined by FIFRA Section 2(y), 7 U.S.C. § 136(y) and is subject to the act;

(3) Dupont Benomyl Technical, Dupont Benlate Fungicide, and Olympic Benomyl 50 DF are pesticides as defined at FIFRA Section 2(u), 7 U.S.C. §136(u); and

(4) Respondent is a "producer" as defined by FIFRA Section 2(w), 7 U.S.C. § 136(w).

On March 22, 1991, Respondent recalled its Benlate 50 DF products (which includes all of the pesticides at issue in this proceeding) because of a concern raised by the possible contamination of some of the batches of these products with atrazine. The recalled products were stored (along with returned products) in a warehouse in Helena, Arkansas, pursuant to a contractual arrangement with the Blackhawk Warehousing and Leasing Company (Blackhawk). These recalled products were received by Blackhawk, stored in a warehouse dedicated to DuPont products, and maintained in a sectioned-off part of the warehouse which contained only these recalled Benlate products. The products at issue here, which consist of Benlate 50 DF Fungicide, Olympic Benomyl 50 DF, and DuPont Benlate Fungicide, are being held by Respondent on an indefinite quarantine basis and have not been held for sale or distribution since March 22, 1991. See Affidavit of Nancy Moneymaker (attached to Respondent's July 26, 1995 Motion for Summary Judgment).

Upon recall of these products to the Blackhawk warehouse, samples were taken to determine whether or not the levels of DBU (or 1,3-dibutyl urea) were in excess of the upper certified limits for DBU in the Confidential Statement of Formula for the respective pesticides.³ In the attachment to this order, which was taken from Respondent's Motion for Summary Judgment (p. 14), is a chart which sets forth the figures at issue in this dispute. In Column A are the levels of DBU found by Respondent in the samples at issue (at the time of recall) in Counts I through XIX and XXIII and XXIV. In Column B are the range of DBU levels at the time of manufacture for the samples at issue in Counts XX through XXII. See Affidavits of Edward J. Silveira and Donald M. Morgan, attached to Respondent's July 26, 1995 Motion for Summary Judgment. See also Motion for Summary Judgment at 6 n.6. When the percentage levels in Columns A and B are compared with the upper certified levels in Column D, it is clear that they fall below the upper certified levels. ⁴ Complainant has offered no evidence to contradict the showing by Respondent that these were the DBU levels of the respective samples at the time of recall.

On January 11, 1994, an EPA credentialed inspector gathered unopened, two-pound container samples of the Benlate Fungicides. Thereafter, EPA conducted an analysis and came up with the results set forth in Column C of the Attachment.⁵

In essence, the main argument between Respondent and Complainant is as follows: Complainant argues that the fact that the batches of pesticides in question were once offered for sale and were distributed is sufficient to meet the test of Section 12(a)(1) of FIFRA which makes it unlawful "to distribute or sell" certain pesticides. The fact that the batches in question were recalled from the market and stored in a warehouse is said by Complainant to be irrelevant.⁶

Respondent argues that no liability exists because the batches sampled by Complainant (although at one time distributed or sold) were withdrawn from the market, were shown to be within upper certified levels of DBU at the time they were withdrawn, and were held in a warehouse with absolutely no intention of selling or distributing these batches to any person in the future. Therefore, Respondent argues that all counts of this Complaint should be dismissed.

Respondent's arguments are persuasive. There is nothing in either the statutory definition of "to distribute or sell" or the "regulation definition" of that same phrase set forth earlier in this decision which supports Complainant's argument that batches of a pesticide which were withdrawn from the market are still subject to the strictures of FIFRA. It is true that the language of 40 C.F.R. § 152.3 includes the term "distributed or sold." However, it is clear

from the context of this language that this phrase is intended to cover, among other things, pesticides that are at some process in the stream of commerce from manufacture to ultimate end use. An example might be pesticides in a retail store, or in the possession of an end user. It strains credibility and common sense to construe the language "distribute or sell" to apply to samples of pesticides taken from batches withdrawn from the marketplace because of concerns that they may be contaminated, albeit by another contaminant such as atrazine. To use these samples as a basis for penalizing a Respondent, who appears from the evidence to be acting as a responsible corporate citizen, is not supported in this record.⁷

All counts of this Complaint are dismissed and Respondent's motion for accelerated decision is **granted**.

Consistent herewith, Complainant's motion for accelerated decision is **denied**.

Charles E. Bullock
Administrative Law Judge

Dated: January 6, 1997
Washington, D.C.

¹ Complainant Jesse Baskerville, Director, Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement, United States Environmental Protection Agency.

² Respondent is E.I. du Pont de Nemours and Company.

³ DBU occurs in these pesticides because: (1) it is produced during the manufacture of technical grade benomyl; (2) it can be present as an impurity in the butylisocyanate used to make benomyl, or (3) it can form in small amounts as a degradation product of benomyl during the formulation of these products or during the storage of the Benlate 50 DF and the DuPont Benlate Fungicide products. See Affidavit of Dennis R. Keeler, attached to Respondent's July 26, 1995 Motion for Summary Judgment.

⁴ Respondent makes an alternative argument that the upper certified levels set forth in Column D, which are relied upon by Complainant, are not the proper figures. However, in view of the result of this order, that argument will not be addressed because, even assuming that Complainant's upper certified levels are correct, Respondent still prevails in its motion for accelerated decision.

⁵ There are also arguments concerning whether Complainant shared the results of its testing with Respondent in a timely manner. As a result of the ruling in this order, these issues need not be decided.

⁶ The parties also argue about whether storage for three years in a hot warehouse caused the excessive DBU levels, and whether or not that should have occurred. This argument need not be addressed because of the ruling in this order.

⁷ See In re Water Services, Inc., IF&R Docket No. IV-167-C, issued December 20, 1976, 1976 FIFRA Lexis 26. Compare: Ortex Products of California (Inc.)., FIFRA-09-0829-C-93-04 (December 15, 1996).