

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR**

In the Matter of:) DOCKET NO: FIFRA-03-2015-0248
)
FMC Corporation,)
)
Respondent)

**COMPLAINANT’S RESPONSE TO RESPONDENT FMC CORPORATION REQUEST FOR
ORAL ARGUMENT ON COMPLAINANT’S MOTION FOR PARTIAL ACCELERATED
DECISION AS TO LIABILITY FOR VIOLATIONS 1 THROUGH 12,273 OF THE COMPLAINT**

Complainant, the Director of the Land and Chemicals Division, United States Environmental Protection Agency, Region III (“Complainant”), pursuant to 40 C.F.R. §§ 22.16(b) and 22.20(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, Issuance of Compliance or Corrective Action Orders, and the Revocation, Termination or Suspension of Permits (“Consolidated Rules of Practice”), respectfully submits this response to the request by FMC Corporation (“Respondent”) for oral argument on Complainant’s Motion for Partial Accelerated Decision as to Liability for Violations 1 through 12,273 of the Complaint (“Complainant’s Motion”). For the reasons stated below, Complainant opposes Respondent's request:

1. Complainant submits that the facts and arguments set forth in Complainant’s Memorandum¹, Respondent’s Opposition² and Complainant’s Reply³ are sufficient for the

¹ “Complainant’s Memorandum” refers to Complainant’s Memorandum of Law in Support of Complainant’s Motion for Partial Accelerated Decision As to Liability for Violations 1 through 12,273 of the Complaint, filed on August 22, 2016.

² “Respondent’s Opposition” refers to Respondent FMC Corporation’s Opposition to Complainant’s Motion for Partial Accelerated Decision As to Liability for Violations 1 through 12,273 of the Complaint, filed on September 6, 2016.

³ “Complainant’s Reply” refers to Complainant’s Reply to Respondent FMC Corporation’s Opposition to Complainant’s Motion for Partial Accelerated Decision As to Liability for Violations 1 through 12,273 of the Complaint, filed on September 16, 2016.

Presiding Officer to rule on Complainant's Motion, and that no additional clarification – by oral argument or otherwise - is necessary.

2. As to the specific issues requested by Respondent to be addressed by oral argument, Complainant submits that:

A. Sections V.B. and C. of Complainant's Memorandum, Section III.B of Respondent's Opposition and Section III. A. of Complainant's Reply provide the Presiding Officer with an ample explanation of the facts and arguments to determine if expert testimony about the meaning of the terms "advertisements" or "advertising" is necessary in order to find whether FMC's direct mail, print and website materials, and FMC's conduct in regard to such materials, are regulated under 40 C.F.R. § 152.168 and FIFRA. Notably, Section III. A. of Complainant's Reply cites Environmental Appeals Board precedent⁴ finding it inappropriate to rely on expert testimony to define the legal meaning of terms such as "advertisements" and "advertising", which are neither terms of art nor complex scientific terms.

B. Sections V.E and F. and VI. of Complainant's Memorandum, Section III.A. of Respondent's Opposition, and Section III.C. of Complainant's Reply provide the Presiding Officer with an ample explanation of the facts and arguments to determine and rule whether there are genuine issues of material fact regarding the unit of violation (i.e., number of violations) in connection with the 9,645 direct mailers sent to individual farm/grower consumers and the 2,622 direct mailers sent to individual retail purchasers.

⁴ i.e., *In re Carbon Injection Systems, LLC*, 2016 EPA App. LEXIS 7, at *45 (E.A.D. Feb. 2, 2016)(finding that "the ALJ erred by relying on an industry expert's testimony concerning the common, ordinary meaning of the regulatory term "energy" given the general presumption against expert testimony on legal questions in judicial proceedings.")

3. Complainant submits that Respondent's request does not comply with the Presiding Officer's May 6, 2016, Prehearing Order which states that "a party may submit a written request for oral argument *upon filing a motion, a response to a motion, or a reply.*" Prehearing Order at 4 (emph. added). Respondent should have submitted its request for oral argument on September 6, 2016 -- upon the filing of its response to Complainant's Motion -- that is, *before* Complainant filed its reply to such response.

4. As Respondent has already had several opportunities to establish the existence of genuine issues of material fact, "explain the significance of the facts" and "elaborate [its] arguments" in its pleadings and other filings in this matter, Complainant submits that granting oral argument on the same would be an inefficient use of judicial resources particularly because the issues are of a nature that can be adjudicated based on the materials the parties have already filed.

5. While Complainant does not believe that the issues identified by Respondent are of a "complexity"⁵ that warrant oral argument, Respondent can seek leave of the Court to file an additional response (*i.e.*, sur-reply) to the pending motion pursuant to 40 C.F.R.

§ 22.16(a) to the extent it deems further elaboration of its legal arguments necessary.

Complainant reserves its rights under the Consolidated Rules of Practice to respond should Respondent seek such leave.

6. For the reasons stated above, Respondent's request for oral argument should be denied.

Notwithstanding, if the Presiding Officer determines that oral argument would be of assistance in

⁵ In the limited number of instances where Presiding Officers have ordered oral argument in the past, the legal issues involved appeared to be highly complex in nature. *See e.g., In re The Okonite Company, Inc., 2010 EPA ALJ LEXIS 20* (ALJ, September 8, 2010)(oral argument ordered to address whether failure to register a PCB Transformer by December 28, 1998, pursuant to 40 C.F.R. § 761.30(a)(1)(vi)(A), precludes subsequent registration and authorized use of the PCB Transformer under TSCA); *In re U.S. Dep't of the Army*, 1999 EPA ALJ LEXIS 138 (ALJ, April 22, 1999) and *In re U.S. Dep't of the Navy*, 1999 EPA ALJ LEXIS 22 (ALJ, March 23, 1999) (oral argument ordered to address whether EPA has authority to impose penalties on another Federal agency under Section 9006 of the RCRA for violations of underground storage tank regulations).

ruling on Complainant's Motion, Complainant will make itself available to participate at a location and via a format to be determined.

Respectfully submitted,

SEP 30 2016

DATED: _____



Jennifer M. Abramson
Janet E. Sharke
U.S. EPA, Region III (3RC50)
1650 Arch Street
Philadelphia, PA 19103
Abramson.Jennifer@epa.gov

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CERTIFICATE OF SERVICE

I hereby certify that, on the date below, copies of COMPLAINANT'S RESPONSE TO RESPONDENT FMC CORPORATION REQUEST FOR ORAL ARGUMENT ON COMPLAINANT'S MOTION FOR PARTIAL ACCELERATED DECISION AS TO LIABILITY FOR VIOLATIONS 1 THROUGH 12,273 OF THE COMPLAINT were served upon the persons listed in the manner indicated.

Original and one copy via the OALJ E-filing System

Sybil Anderson, Headquarters Hearing Clerk

One copy via the OALJ E-filing System

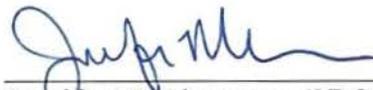
Christine Coughlin, Administrative Law Judge

One copy via UPS Next Day Air

Kathryn E. Szmuszkovicz
Daniel B. Schulson
Beveridge & Diamond PC
1350 I Street, N.W., Suite 700
Washington, DC 20005-3311

SEP 3 0 2016

Date



Jennifer M. Abramson (3RC50)
Senior Assistant Regional Counsel
U.S. EPA, Region III