

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
VENQUEST TRADING, INC.,) Docket No. FIFRA-09-2008-0001
)
Respondent)

**ORDER GRANTING COMPLAINANT'S MOTION FOR ACCELERATED DECISION
ON LIABILITY**

I. Background

This proceeding was initiated on January 22, 2008, by the Associate Director for Agriculture of the Communities and Ecosystems Division, United States Environmental Protection Agency, Region IX ("EPA" or "Complainant"), filing an Administrative Complaint pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136l(a)(1), charging Respondent Venquest Trading, Inc. with the sale and distribution of an unregistered pesticide in violation of FIFRA Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), and implementing regulations. Specifically, the Complaint alleges that Respondent distributed, sold, offered for sale, held for sale, or offered to deliver in commerce "Naphthalene Ball," a pesticide which is not registered with EPA. The Complaint charges Respondent in 241 counts of violation, each count representing a sale or distribution of "Naphthalene Ball" to a particular person or business entity on a particular date. The Complaint does not propose a specific monetary penalty, but requests that a civil administrative penalty of up to \$6,500 be assessed for each violation of FIFRA pursuant to FIFRA Section 14(a)(1), 7 U.S.C. § 136l(a)(1).

Respondent, through counsel, filed an Answer to the Complaint, denying virtually every allegation in the Complaint and setting forth several Affirmative Defenses. Pursuant to a Prehearing Order, both parties submitted their Prehearing Exchanges, and on October 15, 2008, the parties filed Stipulations.

On October 21, 2008, Complainant filed a Motion for Accelerated Decision on Liability ("Motion"), asserting that there is no genuine issue of fact as to Respondent's liability for the alleged violations. To date, Respondent has not filed any response to the Motion.

II. Discussion and Conclusion

The Consolidated Rules of Practice which govern this proceeding, 40 C.F.R. part 22 (“Rules”), provide at 40 C.F.R. § 22.16(b) that a “response to any written motion must be filed within 15 days after service of such motion,” and that “[a]ny party who fails to respond within the designated period waives any objection to the granting of the motion.” The Motion having been served on October 21, 2008, a response was due on November 5, 2008. Because no response was filed, Respondent has waived any objection to the granting of the Motion. On that basis, the Motion may be granted.

Furthermore, the Motion may be granted on the basis that Respondent has admitted to liability for all of the violations alleged in the Complaint. In its Prehearing Exchange (at 3), Respondent states, “Venquest submits that liability of the 243 [sic] violations of FIFRA § 12(a)(1)(A) is not at issue”

However, before accelerated decision may be granted, the Motion and documents in the case file must establish that there is no genuine issue of fact that is material to liability and that Complainant is entitled to judgment as a matter of law. Section 22.20(a) of the Rules states that:

The Presiding Officer may at any time 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.

To determine which facts are material to liability and whether EPA is entitled to judgment as a matter of law, the elements of a violation must be established with reference to the relevant statutory and/or 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 . . .

7 U.S.C. § 136(u). 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.

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); see also, 40 C.F.R. § 152.3(j).

To establish a violation of Section 12(a)(1)(A) of FIFRA, EPA must show that Respondent is a “person” who “distributed or sold” to any other person “any pesticide that is not registered” under FIFRA. EPA and Respondent have stipulated that Respondent is a “person” within the meaning of FIFRA (Stipulations, dated October 15, 2008 (“Stip.”) ¶ 3a. The parties have also stipulated that from October 2005 through October 2006, Respondent distributed or sold the product known as “Naphthalene Ball” at its facility, that “Naphthalene ball” is used to kill or control moths and other insects, and that moths and other insects are “pests” as defined by Section 2(t) of FIFRA. Stip. ¶¶ 3c, 3d, 3e. The parties also stipulated that “Naphthalene Ball” is a “pesticide” as defined by Section 2(u) of FIFRA, and that from October 2005 through October 2006, “Naphthalene Ball” was not registered with the EPA. Stip. ¶ 3f, 3g. Finally, the parties stipulated that Respondent distributed, sold, offered for sale, held for sale, offered to deliver in commerce or some combination thereof “Naphthalene Ball” as alleged in Paragraphs 10 through 250 of the Complaint. Stip. ¶ 3h. Paragraphs 10 through 250 of the Complaint allege that Respondent sold or distributed “Naphthalene Ball” to a particular person or business entity on a particular date in the time period between October 2005 and October 2006.

EPA has established the elements of violations of Section 12(a)(1)(A) of FIFRA as to each of the 241 counts alleged in the Complaint. See, *Chempace Corp.*, 9 E.A.D. 119, 129-130 (EAB 2000)(“under section 12(a)(1)(A) and (E) [of FIFRA], 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.”)

It is noted that Respondent asserted several Affirmative Defenses in its Answer. The Tenth and Eleventh Affirmative Defenses are only relevant to a penalty assessment and are not relevant to liability. The First through Ninth Affirmative Defenses are merely a general list of affirmative defenses, including failure to state a cause of action, ratification, statute of limitations, estoppel, waiver, and unjust enrichment. Respondent did not state any facts or argument in support of the Affirmative Defenses in its Answer or its Prehearing Exchange, although the Prehearing Order, dated August 7, 2008, directed Respondent to provide a narrative statement and documents in support explaining in detail the factual and/or legal bases for each of the Affirmative Defenses. Instead, Respondent stated in its Prehearing Exchange statement (at 3) that it was without knowledge that naphthalene balls were pesticides within the meaning of FIFRA or that they were required to be registered for sale or distribution in the United States, that it sold the moth balls “in good faith compliance with all laws and regulations” (citing to its prehearing exchange exhibits marked RX 1 and RX 2), that it did not receive notice from U.S. Customs or any other regulatory agency that the pesticides required registration, and that it fully cooperated in ceasing all sales of the moth balls after being given notice by EPA.

FIFRA is a strict liability statute and therefore arguments based upon lack of knowledge or intent to violate do not provide a defense to liability for violations of Section 12(a)(1)(A). *Sultan Chemists, Inc.*, 9 E.A.D. 323, 349, 2000 EPA App. LEXIS 24 *59 (EAB 2000)(“good faith cannot serve to defeat liability under a strict liability statute like FIFRA”). Therefore, Respondent’s arguments that it was unaware that its product was a pesticide or that the product was required to be registered before being sold or distributed, and that it acted without knowledge that it was violating the statute and without intent to do so, is immaterial to determining liability. *Hing Mau, Inc.*, EPA Docket No. FIFRA-9-2003-0017, 2003 EPA ALJ LEXIS 63 * 51 (ALJ, Aug. 25, 2003)(sellers of unregistered mothball products were assessed penalties and found negligent for failing to realize the products were pesticides).

Accordingly, the Affirmative Defenses listed by Respondent in its Answer are either immaterial to liability or are deemed abandoned. It is concluded that Complainant has shown that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law with respect to liability on all counts alleged in the Complaint.

ORDER

1. Complainant's Motion for Accelerated Decision on Liability is **GRANTED**.
2. The parties shall continue in good faith to attempt to negotiate a settlement of this matter. Complainant shall file a status report as to the progress of settlement discussions on or before **December 29, 2008**.




Susan L. Biro
Chief Administrative Law Judge

Dated: November 21, 2008
Washington, D.C.

In the Matter of Venquest Trading, Inc., Respondent
Docket No. FIFRA-09-2008-0001

CERTIFICATE OF SERVICE

I certify that the foregoing **Order Granting Complainant's Motion For Accelerated Decision On Liability**, dated November 21, 2008, was sent this day in the following manner to the addressees listed below.



Maria Whiting-Beale
Staff Assistant

Dated: November 21, 2008

Original And One Copy By Hand To:

Danielle E. Carr
Regional Hearing Clerk
U.S. EPA
75 Hawthorne Street, ORC-1
San Francisco, CA 94105

Copy By Pouch Mail To:

David H. Kim, Esquire
Assistant Regional Counsel
U.S. EPA
75 Hawthorne Street, ORC-3
San Francisco, CA 94105

Copy By Regular Mail To:

Edward Hung, Esquire
Wong & Associates
413 Third Street
Oakland, CA 94607