

In considering a motion for accelerated decision, the judge must draw all reasonable inferences in favor of the party opposing the motion. Although no new evidence or affidavit was presented, I will nevertheless assume the complete truth of all assertions made in Respondent's motion for reconsideration. According to the motion, Chempace marketed GLY only as a deodorizer, and sold it to customers who used it only for that purpose. These facts are not in dispute.

Nevertheless, Respondent has not raised a factual issue that could bar its liability for selling the unregistered pesticide GLY. Chempace cites 40 CFR §152.10, entitled "**[P]roducts that are not pesticides because they are not deemed to be used for a pesticidal effect,**" to support its claimed exemption. That section reads as follows:

"A product that is not intended to prevent, destroy, repel, or mitigate a pest, or to defoliate, desiccate or regulate the growth of plants, is not considered to be a pesticide. The following types of products or articles are not considered to be pesticides *unless a pesticidal claim is made on their labeling or in connection with their sale and distribution:*

(a) Deodorizers, bleaches, and cleaning agents; . . ." (italics added).

The GLY label that was on the products sold by Chempace includes the pesticidal claim that the product will "destroy many bacteria" when used as a surface disinfectant. Thus, under the plain language of the regulation, the GLY here fails to qualify for the exemption even assuming it was marketed and purchased only as a deodorizer.

Chempace has asserted that those labels were "inadvertently" placed on the GLY containers. Unfortunately, that was Respondent's mistake. There is no need to speculate whether Respondent could have been held liable for any FIFRA violations for the sale of GLY if it had removed the pesticidal claim from the labelling on the product. However, the label that was used indicates that the product itself was intended to be used as a pesticide and/or deodorizer, despite the marketing that characterized the 26 transactions that are the subjects of the Complaint.

Order

Respondent's motion for reconsideration of my prior Order with respect to the GLY counts is denied.

Andrew S. Pearlstein

Administrative Law Judge

Dated: November 14, 1997

Washington, D.C.