UNITED STATES ENVIRONMENTAL PROTECTION AGENCY BEFORE THE ADMINISTRATOR

In	the Matter	of)		
)		
	Chempace	Corporation)	Docket No.	5-IFFRA-96-017
)		
	Res	spondent)		

ORDER DENYING MOTION FOR RECONSIDERATION

The Respondent, Chempace Corporation ("Chempace") has filed a motion seeking reconsideration of a portion of my Order of October 15, 1997. That Order granted the Region's motion for partial accelerated decision, and found Respondent liable for all 99 violations alleged in the Complaint in this proceeding. Respondent now seeks reconsideration of that portion of the Order that found Chempace liable for selling the unregistered and cancelled pesticide "GLY" on 26 occasions, comprising Counts XXX to LV of the Complaint. With respect to those counts, Respondent was found to have committed 26 violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") \$\$12(a)(1)(A) and 12(a)(2)(K), 7 U.S.C. \$\$136j(a)(1)(A) and 136j(a)(2)(K). The Region 5 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") has filed a memorandum in opposition to Chempace's motion for reconsideration.

Respondent's motion does not include any new evidence or affidavits. It does, however, further explain and clarify Chempace's position as stated in the affidavit of its President, Ralph Wooddell, which was attached to Respondent's memorandum in opposition to Complainant's original motion for partial accelerated decision. It is now clear that there were never two distinct products called "GLY," one of which was a deodorizer and one a pesticide. Rather, the GLY that Respondent sold, as indicated on its label, was a single product that can be used as either a surface disinfectant, i.e. as a pesticide, or as an aerosol deodorizer.

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.