



Under the title of a motion in limine, Complainant has sought several evidentiary rulings on the admissibility of documents, and its intent not to call a penalty witness, at the hearing. I see no reason to rule on these motions, as no apparent controversy exists. Respondent has not made any objections or motions concerning these matters. Such evidentiary rulings will be made during the hearing in due course. When the hearing location is confirmed, I will issue a prehearing notice that will indicate that the hearing will also be preceded by a conference at which we will discuss stipulating to the receipt of exhibits, and other matters to promote an efficient hearing.

With respect to the need for a penalty witness, that is normally within the discretion of the Complainant. The order requiring such a witness in the case of *In re Scotts-Sierra Crop Protection Company* was based on unique circumstances not applicable to this case, where no apparent controversy has been raised on this matter.

The Complainant also requested a further ruling on an earlier discovery motion seeking production of additional financial records of Respondent. No further such discovery will be ordered. Respondent has already produced five years' tax returns and financial statements. Complainant's latest prehearing exchange includes an analysis of Respondent's ability to pay by Complainant's financial expert. If the additional undisclosed documents are shown at the hearing to be relevant to the penalty assessment, adverse inferences could be drawn against Respondent's position.

#### Respondent's Motion for Reconsideration

Respondent has moved for reconsideration of my order denying its motion for partial accelerated decision on the grounds that it was untimely. Respondent however reinforces that decision by indicating that it was aware of the issue of multiple counts 10 months ago. Respondent does not explain why it waited until less than one month before the hearing before filing the motion.

As it happens, regardless of Complainant's intended cooperation, at the time of the motion I was scheduled to be out of my office for virtually the entire time before the hearing in this matter. Although one hearing I had scheduled has since settled, providing some additional time, the motion is still untimely. Under the service by mail rules, Complainant need not have responded until February 28 or (possibly the week of March 2, depending on when it was received), under 40 CFR §§22.16(b) and 22.07(c).

Nevertheless, an additional factor in the decision to deny the motion was its unlikelihood of success. On its face, the charge of distributing or selling an unregistered pesticide is different in character in terms of the statutory "unit of violation" than the violations under consideration in the cases of *In re Associated Products, Inc.* and *In re McLaughlin Gormley King Co.* FIFRA §12(a)(1)(A) renders it unlawful "to distribute or sell to any person -- any pesticide that is not registered." A straightforward interpretation of this language indicates that the unit of violation is the act of distribution or sale. Each such act of distribution or sale would logically constitute a separate violation where there have been multiple, factually separate transactions. The cases cited by Respondent concern completely different FIFRA violations, in which the relevant violations were construed to constitute single violations. They do not lend support to Respondent's position on the unit of violation for violations of §12(a)(1)(A).

In any event, this legal argument could be renewed after hearing. But the more promising course, best resolved through the hearing process, is to focus on the amount of the penalty in terms of the statutory factor of the gravity of the violation.

#### Order

All the above described motions are denied. The parties are advised to concentrate their efforts on preparing for hearing and/or settling this case, rather than filing unproductive motions at this late stage.

Respondent has also requested that a conference call be held to discuss these prehearing filings. These rulings and the accompanying Prehearing Notice should answer those concerns. If both parties jointly desire a conference call for a specific purpose, they may request during the coming week.

Andrew S. Pearlstein  
Administrative Law Judge

Dated: February 27, 1997  
Washington, D.C.

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