

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
)	Docket No. FIFRA-08-2006-0001
)	
4 Seasons Cooperative)	
)	
Respondent)	

**Order Denying Complainant’s Motions for Findings of Fact and
Conclusions of Law and For Accelerated Decision As to Liability**

I. Background and Procedural History

This proceeding under Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act (“FIFRA” or “Act”), 7 U.S.C. § 136l(a)(1), was commenced on October 5, 2005, by the filing of a complaint by the Technical Enforcement Program and Legal Enforcement Program, Office of Enforcement, Compliance and Environmental Justice, United States Environmental Protection Agency, Region VIII (“Complainant” or “EPA”). The complaint charges 4 Seasons Cooperative (“Respondent” or “4 Seasons”) with failure to file an annual pesticide production report in violation of Section 12(a)(2)(L) of the Act, 7 U.S.C. § 136j(a)(2)(L). Specifically, the Complaint alleges that Respondent failed to submit an annual pesticide production report for 2004 on or before March 1, 2005, for its Redfield, South Dakota facility. EPA proposed a civil penalty of \$6,500.

Respondent, through counsel, filed an Answer on October 21, 2005, denying the alleged violation and objecting to the proposed penalty or indeed, any penalty (Answer at 2). Respondent demanded a public hearing. Respondent states that effective January 31, 2005, it merged with Farmers Union Oil Company of Redfield and Doland (“Farmers Union”)(*id.* at 1). As a result of the merger, Mr. Joel Frohling became manager of Respondent’s Redfield and Doland facilities.¹ Although the address of Farmers Union Oil Company of Redfield and Doland was Redfield, South Dakota, Mr. Frohling apparently elected to manage operations

¹ *Id.* It is of interest that a Mr. Lance Frohling, relationship to Joel Frohling not stated, is the manager of Respondent’s Redfield facility. See Voluntary Statement of Lance Frohling taken by Mr. Chuck Tollefson, an inspector of the South Dakota Department of Agriculture, at the time of an inspection of 4 Seasons’ Redfield facility on September 15, 2005 (Bulk Pesticide Repackaging Inspection Report for 4 Seasons Cooperative, Redfield, South Dakota, C’s Phx 5 at 16). Mr. Frohling’s statement provides: “The bulk pesticide report submitted to the EPA had both Doland and Redfield’s products on the same report. Touchdown CF, Touchdown IQ and G-Max Lite are Redfield bulk products.”

from the Doland, South Dakota facility.² According to 4 Seasons, Mr. Frohling was left with a pile of papers from the previous manager, including EPA Form 3540-16, Pesticide Report for Pesticide- Producing and Device- Producing Establishments (*id.*). Uncertain as to how to fill out the document, Mr. Frohling telephoned the EPA (*id.*). Respondent alleges that Mr. Frohling, based on the information provided by EPA, prepared separate forms (“Pesticide Production Reports”) for the Redfield and Doland facilities and mailed the completed Reports to EPA in Denver, Colorado on or about February 17, 2005 (Answer, Exhs A and B). Exhibit A is allegedly the Pesticide Production Report applicable to the Redfield facility while Exhibit B is the Report allegedly applicable to the Doland facility. Each Report, however, lists the company name as “4 Seasons Coop”, the address as Box 386, Doland, S.D. and the EPA Establishment No. as 056106-SD-001, which is the establishment number for Respondent’s Doland, S.D. facility. The EPA establishment number for Respondent’s Redfield facility is 056902-SD-001 (C’s Phx 14). Examination of these Reports reveals no obvious indication that either was intended to report pesticide production at Respondent’s Redfield facility. A worksheet (R’s Phx D), which Mr. Frohling allegedly used in preparing the Pesticide Production Reports (R’s Phx B and C), supports Respondent’s claim that its reported production activities included repackaging activities at its Redfield facility.³ Therefore, Respondent argues that it has substantially complied with EPA’s reporting rules and that the Complaint should be dismissed.

As indicated supra, 4 Seasons merged with Farmers Union Oil Company of Redfield and Doland, effective January 31, 2005. 4 Seasons assumed all claims, accounts, debts, liabilities, and obligations of Farmers Union as of the effective date of the agreement (Unification Agreement, C’s Phx 4). Respondent is a pesticide producer incorporated in the State of South Dakota (Complaint at 3). Currently, Respondent operates a facility located at 25 East 6th Avenue, Redfield, South Dakota (“Redfield Facility”) and another facility in Doland, South Dakota⁴ (“Doland Facility”) (Motion for Accelerated Decision at 3-4).

Both parties have filed prehearing exchanges (“Phx”). On March 1, 2006, Complainant filed [a] Motion for Findings of Fact and Conclusions of Law and [a] Motion for Accelerated Decision as to Liability and a Memorandum in support thereof (“Motion “)

² Mr. Tollefson (identified, supra note 1) prepared a Bulk Pesticide Repackaging Inspection Report of his inspection of 4 Season’s Redfield facility on September 15, 2005 (C’s Phx 5). The Report indicates that when he asked Mr. Lance Frohling for a copy of the annual report submitted to EPA (Form 3540-16), it was determined, after much searching and telephone calls to the main manager, Joel Frohling at the Doland, SD facility, that products repackaged at the Redfield, SD facility were combined with the Doland repack report.

³ Although a Pesticide Production Report for the Redfield establishment for 2003 is in the record (C’s Phx 10), production quantities have been redacted for CBI concerns and production quantities for 2003 may not be compared with those on the report which allegedly shows pesticide production at the Redfield establishment in 2004.

⁴ Other than simply Main Street, a street address for the Doland Facility has not been provided. However, the Pesticide Production Reports submitted by 4 Seasons (R’s Phx B and C) reflect that the mailing address is Box 386, Doland, SD, 57436.

pursuant to 40 C.F.R. §§ 22.16(a)⁵ and 22.20(a)⁶. EPA says that 4 Seasons was required by statute (7 U.S.C. § 136e(c)(1)) and by regulation (40 C.F.R. § 167.85) to file a report of pesticides produced at each establishment during the preceding year. Annual reports are required to be submitted on or before March 1 of the succeeding year (40 C.F.R. § 167.85(d)). Complainant asserts that no genuine issue of material fact exists but that 4 Seasons failed to file a 2004 Pesticide Report for Pesticide Producing Establishments for its Redfield establishment by March 1, 2005. Therefore, Complainant argues that it is entitled to judgment as a matter of law that Respondent violated the Act and the regulation as alleged in the Complaint.

4 Seasons filed an Objection to Complainant's Motion for Findings of Fact and Conclusions of Law and Complainant's Motion for Accelerated Decision As to Liability ("Objection") under date of March 8, 2006. Respondent points out that an accelerated decision may only be granted if there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.

4 Seasons alleges that Complainant has misstated the facts, pointing specifically to Proposed Finding of Fact No. 9, which is to the effect that Respondent did not file a 2004 Pesticide Report for Pesticide Producing Establishments, EPA Form 3540-16, for its Redfield Establishment (EPA Est. No. 056902-SD-001). Respondent says that this allegation has been disputed throughout this litigation.

Explaining the foregoing assertion, Respondent quotes the Answer at paragraph 5 and refers to the summary of Mr. Joel Frohling's anticipated testimony contained in its prehearing exchange. Paragraph 5 of the Answer is as follows:

Mr. Frohling telephoned an EPA agency (either at Pierre, South Dakota, or Denver, he does not remember) and obtained answers to his questions. Based on the information given him, Mr. Frohling prepared separate forms for the Redfield and Doland facilities. Copies of said reports are attached hereto and designated Exhibit "A" and Exhibit "B". Both reports were mailed on or about February 17, 2005, to:

⁵ The Consolidated Rules of Practice, 40 C.F.R. § 22.16(a), provide:

(a) General. Motions shall be served as provided by § 22.5(b)(2). Upon the filing of a motion, other parties may file responses to the motion and the movant may file a reply to the response. Any additional responsive documents shall be permitted only by order of the Presiding Officer or Environmental Appeals Board, as appropriate. All motions, except those made orally on the record during a hearing, shall:

- (1) Be in writing;
- (2) State the grounds therefor, with particularity;
- (3) Set forth the relief sought; and
- (4) Be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon.

⁶ The Consolidated Rules of Practice provide at 40 C.F.R. § 22.20(a), in part: "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."

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The summary of Mr. Frohling's anticipated testimony states that he obtained the number to call for information concerning the completion of EPA Form 3540-16 from the instructions for completing that form and thus is definite that he called Denver rather than Pierre.⁷ This information is supported by Mr. Frohling's affidavit, dated March 8, 2005, attached to 4 Seasons' Objection to Complainant's Motion. In addition, Mr. Frohling states that in preparing the Pesticide Production Reports (Exhibits B and C), he worked from a worksheet prepared by him (R's Phx D) and that in preparing and submitting the above-described reports to EPA, pursuant to instructions given him by EPA, Affiant intended, and assumed to comply with the EPA reporting requirements for both facilities-Redfield and Doland (Affidavit at 2).

Under date of March 22, 2006, Complainant replied to 4 Seasons' Objection to its Motion, reiterating that there are no genuine issues of material fact remaining in this case, and requesting that the ALJ issue an accelerated decision as to liability and adopt the proposed findings of fact and conclusions of law set forth in its Motion. Complainant asserts that the Objection challenges only EPA's proposed findings of fact and conclusions of law No. 9, concerning the 2004 Pesticide Report (Reply at 1-2). EPA argues that all other findings of fact and conclusions of law in its Motion are unopposed and should be adopted (*id.* at 2). Further, Complainant contends that Respondent has not raised any new facts or issues (*id.*). Complainant "vigorously disagrees with the insinuation" that an EPA employee would have directed Mr. Frohling to submit only one form (*id.*). Moreover, Complainant contends, that even if an EPA employee had told Mr. Frohling to submit only one form, "Respondent is nonetheless obligated to conform to conduct required by the rule." (*id.*) According to EPA, 4 Seasons may not substitute statements by an unidentified EPA employee for compliance with regulatory requirements (*id.*). Complainant argues that the Act and the regulations are "clear" and that, while Respondent's reliance on an EPA employee statement may be pertinent to determining the amount of penalty, it is not pertinent to liability (*id.* at 2-3).

II. Discussion

Under the Consolidated Rules of Practice governing this proceeding, an Administrative Law Judge may render an accelerated decision in favor of a party as to all or all part of a proceeding if no genuine issue of material of fact exists and if that party is entitled to judgment as a matter of law (40 C.F.R. § 22.20(a); *Hing Mau, Inc.*, Docket No. FIFRA-9-2001-0017, 2002 EPA ALJ LEXIS 49 (ALJ Aug. 13, 2002)). The standard for granting a motion for accelerated decision is analogous to that of a motion for summary judgment under

⁷ A letter from counsel for 4 Seasons to EPA counsel, dated July 12, 2005, in response to an EPA Notice of Violation and Opportunity to Confer, dated June 21, 2005, states that Mr. Frohling called someone in Pierre and was told to use the same form for both stations (C's Phx 1 and 3).

Rule 56 of the Federal Rules of Civil Procedure (*Green Thumb Nursery, Inc.*, 6 E.A.D. 782, 793 (EAB 1997); *CWM Chem. Serv.*, 6 E.A.D. 1, 12 (EAB 1995); *Puerto Rico Aqueduct & Sewer Authority v. EPA*, 35 F.3d 600, 605-607 (1st Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995)). In determining such motions, a court is required to view the evidence in the light most favorable to the non-moving party, which is the Respondent in this instance (*Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 158-59 (1970)).

Rule 22.20(a) of the Consolidated Rules of Practice (*supra*, note 5) provides that an Administrative Law Judge “*may* at any time render an accelerated decision,” which demonstrates that issuance of an accelerated decision is a matter of judicial discretion. Moreover, there is ample authority for the proposition that a court in the exercise of sound judicial policy and discretion may deny summary judgment and allow a case to be fully developed at trial (*In re Consumers Recycling, Inc.*, Docket Nos. CAA-5-2001-002, CWA-5-2001-006, RCRA-5-2001-008, MM-5-2001-001, 2002 EPA ALJ LEXIS 48, *18 (ALJ Aug. 22, 2002)(*citing Roberts v. Browning*, 610 F.2d 528, 536 (8th Cir. 1979)). Although an accelerated decision may only be granted where there is no genuine issue of material fact, an ALJ is not obligated to grant an accelerated decision (*In re Franklin National Bank Securities Litigation*, 478 F. Supp. 210, 223 (E.D.N.Y. 1979)(“Satisfying the basic requirements of the rule for summary judgment does not guarantee that the motion will be granted”); *In re of Green Oil Co.*, Docket No. CWA-07-2002-0059, 2003 EPA ALJ LEXIS 5, *7 (ALJ Jan. 31, 2005)). A court may deny such a motion so that the case may be developed at trial, even if the motion is technically proper upon evidentiary review (*Black v. J. I. Case Co.*, 22 F.3d 568, 572 (5th Cir.), *cert. denied*, 513 U.S. 1017 (1994)(“[E]ven in the absence of a factual dispute, a district court has the power to ‘deny summary judgment in a case where there is reason to believe that the better course would be to proceed to a full trial.’”)(*quoting Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 225 (1986)). A court has the discretion to deny even a well-supported motion for accelerated decision “if it believes that the case would benefit from a full hearing.” (*United States v. Certain Real and Personal Prop. Belonging to Hayes*, 943 F.2d 1292, 1297 (11th Cir. 1991)).

Although Respondent has submitted copies of two Pesticide Production Report(s) (EPA Form 3540-16) (Exhibits A and B to its answer, prehearing exchange Exhibits B and C), Complainant argues that these reports cover production only at the Doland facility and are thus only one report (Prehearing Exchange Narrative at 9). In this regard, Paragraph 5 of Respondent’s Answer, highlighted in its Objection to Complainant’s Motion, states that based upon the information given him, Mr. Frohling prepared separate reports for the Redfield and Doland facilities. This is to be contrasted with the reference to a singular two page report which was mailed to the EPA Regional Office in Denver, as stated in the summary of Mr. Frohling’s anticipated testimony in Respondent’s prehearing exchange and in Mr. Frohling’s affidavit. The evidence does appear to support a finding that the reported pesticide production included some pesticide repackaging conducted at the Redfield facility. Because the submitted report(s) contain no apparent indication that pesticide production at the Redfield facility was included, it seems unlikely that the report(s) may be held to satisfy Respondent’s FIFRA production reporting obligations. Nevertheless, it is concluded that this is a case where the evidence should be fully developed at a hearing. Moreover, it appears that the

same evidence would be heard in determining a penalty, if liability is ultimately found. Accordingly, Complainant's Motions For Findings of Fact and Conclusions of Law and For Accelerated Decision As To Liability will be denied.⁸

III. ORDER

Complainant's Motions For Findings of Fact and Conclusions of Law and For Accelerated Decision As To Liability are denied.⁹

Dated this 17th day of April, 2006.

Spencer T. Nissen
Administrative Law Judge

⁸ Complainant's Motion to Replace Exhibit 9, Instructions for Completing EPA Form 3540-16 for reporting year 2004 with a complete copy of the Instructions is granted.

⁹ In the near future, I will be in telephonic contact with counsel for the purpose of scheduling a date and location for the hearing.