UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
GREEN THUMB NURSERY, INC.	)	Docket No. IF&R-V-014-94
	)	
Respondent	)	

ORDERS

I.

On November 4, 1994[1], the United States Environmental Protection Agency, Region V (complainant or EPA), filed a motion for an accelerated decision. Green Thumb Nursery, Inc. (Green Thumb or respondent), responded in opposition to this motion on November 21. Complainant served a reply on December 9. Green Thumb served a sur-response, on December 21, in which it moved to strike or exclude portions of complainant's reply. On January 5, 1995, complainant served a pleading addressing the sur-response.

Complainant charges respondent with the sale and distribution of an unregistered pesticide product under Section 3 of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136a, in violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A). Based upon an inspection of Green Thumb's facility, on January 12, 1993, complainant alleges it uncovered an unregistered pesticide product, labeled as 12 percent solution of sodium hypochlorite, for use in sanitizing water, especially swimming pools. (Complainant's Mot., Exs. A-B.) Complainant

[1] Unless otherwise indicated, all dates are for the year 1994.

further alleges Green Thumb admitted, and the inspection confirmed that respondent sold or distributed this unregistered product during the time of the inspection. (Complainant's Mot. Exs. C, E.)

Respondent does not dispute that its product, sodium hypochlorite, is a pesticide subject to the FIFRA registration requirements. However, respondent contends that there are issues of fact concerning whether or not it complied with the registration requirement. Even if formal registration was not attained from EPA, Green Thumb argues a "de facto" registration was accomplished by supplying the former with all the relevant information several years before the inspection.

Respondent's assertion that there are genuine issues of fact regarding either a de jure or a de facto registration for its pesticide product is without merit. Under 40 C.F.R. § 22.20(a), an accelerated decision is appropriate when no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law. In this case, there are no genuine issues of material fact which exist.

Registration of a pesticide product can be achieved pursuant to Section 3 of FIFRA and its implementing regulations under either the full registration procedure or a more limited supplemental registration. Section 3(c), (e) of FIFRA, 7 U.S.C. § 136a(c), (e); 40 C.F.R. Part 152, Subpart C or 40 C.F.R. § 152.132. Respondent opted for supplemental registration. However, John H. Dennis (Dennis), the president of Green Thumb, conceded that respondent did not receive supplemental registration approval from EPA for

sodium hypochlorite until April of 1993. (Resp't Mot. in Opp'n, Dennis Aff., ¶ 10.) Additionally, respondent's reliance on a statement by a representative of its supplier[2], that a supplemental registration would be submitted on respondent's behalf in the end of 1992 (Dennis Aff., ¶¶ 9, 11), is no substitute for actual receipt of EPA approval concerning such registration. Until respondent possesses an EPA approval of registration notice, assigning a product registration number, no legal registration has occurred. In re Sunset Pools of St. Louis, Inc., Docket No. IF&R-VII-355C, at 9 (Initial Decision, December 5, 1980). Thus, when Green Thumb's facility was inspected in January of 1993, its pesticide product, sodium hypochlorite, was not lawfully registered pursuant to Section 3 of FIFRA. Accordingly, respondent's sale of its unregistered sodium hypochlorite was a violation of Section 12(a)(1)(A).

Even if proper registration was not obtained, respondent also argues that a "de facto" registration of sodium hypochlorite was accomplished. Green Thumb bases this argument on its submission of pesticide producing establishment report forms to EPA since 1987. Respondent's position is untenable. The information respondent submitted relates to Section 7 of FIFRA, 7 U.S.C. § 136e, regarding registration of pesticide producing establishments. However, the

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[2] Respondent also claims that being a small company it relies upon larger suppliers to keep abreast of environmental requirements applicable to its operations. (Dennis Aff., ¶¶ 3-4.) This argument is not persuasive. Once a regulation is published, the regulated community is put on notice of the requirements, and has an affirmative duty to comply with the same.

alleged violation here concerns the sale of an unregistered pesticide under Section 3 of FIFRA, which involves an entirely separate and distinct registration requirement. The fact that Green Thumb may have provided relevant information on these forms, pertaining to the registration of sodium hypochlorite, is immaterial. In order to assure that the public health is protected, the proper procedure for registration must be followed so that EPA has a chance to review and approve of registration for only those products which are not harmful to humans or the environment. In re Sunset Pools of St. Louis, Inc., at 9; In re Sta-Lube, Inc., Docket No. IF&R-09-0407-C-84-40 at 10 (Initial Decision, April 11, 1985).

Further, respondent claimed it provided an EPA product registration number for sodium hypochlorite on its pesticide producing establishment forms. Complainant established that the registration number provided for the years prior to 1992, belonged to Green Thumb's supplier, and as of the inspection in January 1993, the number provided was not an EPA approved registration number. (Complainant's Reply, supplemental Bonace Aff., ¶ 3.) Respondent moved to strike or exclude R. Terence Bonace's (Bonace) supplemental affidavit alleging it raised new evidentiary matters for which respondent has had no opportunity to rebut. Also, Green Thumb objected to Bonace's declarations regarding an unauthenticated computer database.

Respondent's arguments are not convincing. First, the supplemental affidavit was in direct response to Green Thumb's

contention that Bonace's original affidavit did not refer to a review of any records, reports or registrations that may have been filed by respondent regarding registration of sodium hypochlorite. (Resp't Mot. in Opp'n at 2.) Second, as complainant correctly notes, respondent was not prejudiced because it also was free to file a motion for leave to respond to complainant's reply under 40 C.F.R. § 22.16(b). Third, the Administrative Law Judge may grant a motion for accelerated decision on limited evidence such as affidavits. 40 C.F.R. § 22.20(a). Bonace's affidavits were based upon his personal knowledge from review of EPA's computer database which listed all registered pesticide products. Thus, these affidavits are appropriate for consideration in this motion.

Accordingly, complainant has established no genuine issue of material fact exists that respondent's pesticide product, sodium hypochlorite, was not registered in accordance with Section 3 of FIFRA, 7 U.S.C. § 136a, during the inspection of respondent's facility on January 12, 1993. Pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), it is unlawful for any person to sell or distribute an unregistered pesticide. Thus, respondent is responsible for its alleged sale of an unregistered pesticide in violation of Section 12(a)(1)(A).

II.

Section 14 of FIFRA, 7 U.S.C. § 136l, authorizes the assessment of civil penalties for any violation of subchapter II. In determining the amount of a penalty, the Administrator may issue a warning, in lieu of a penalty, if the Administrator finds that

the violation did not cause significant harm to health or the environment. Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4). In this proceeding, respondent submitted its supplemental registration form within a few weeks after the inspection, and received EPA approval of such supplemental registration for sodium hypochlorite roughly a year before the complaint was issued in April of 1994. On this basis, complainant should demonstrate why a warning in lieu of a penalty is not appropriate in this matter.

IT IS ORDERED that:

1. Complainant's motion for partial accelerated decision be GRANTED.

2. Respondent's motion to exclude or strike complainant's supplemental affidavit be DENIED.

3. Complainant show cause why a warning would not be proper against Green Thumb Nursery, Inc.

4. Complainant shall respond within 20 days of the service date of this order.

Frank W. Vanderheyden

Frank W. Vanderheyden
Administrative Law Judge

Dated: March 2, 1995

IN THE MATTER OF GREEN THUMB NURSERY, INC., Respondent,
Docket No. IF&R-V-014-94

Certificate of Service

I certify that the foregoing Order, dated 3/2/95, was sent this day in the following manner to the below addressees:

Original by Regular Mail to:

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Marion Walzel
Marion Walzel
Legal Staff Assistant

Dated: March 2, 1995