2/7/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
SENTCO PAINT MFG. CO., INC.	)	Docket No. IF&R-V-01-91
	)	
Respondent	)	

ORDER DENYING MOTION FOR ACCELERATED DECISION
AND SETTING EVIDENTIARY HEARING

I. Motion for Accelerated Decision

Currently pending is a Motion for Accelerated Decision (Motion) filed by the Complainant in this proceeding. This Motion seeks an entry of a decision in favor of the Complainant on all liability issues and asks that a civil penalty of $10,000 be assessed against the Respondent. Complainant filed its Motion pursuant to Section 22.20 of the EPA Rules of Practice (Rules), 40 C.F.R. §20.22, and contends that the Respondent violated Section 12(a)(1)(A) and (E) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. §§136j(a)(1)(A), by offering for distribution and sale and unregistered and misbranded pesticide, "CREO-SUB". To support the motion, the Complainant relies primarily on exhibits submitted with its prehearing exchange, in particular those relating to an EPA inspection of the Respondent's facility, the report resulting therefrom, and an Agency pesticide registration search.

The Respondent, acting pro se, contests that the product involved is a pesticide and that it was misbranded. In addition, the Respondent raises the issue of its ability to pay any

proposed penalty in view of its tenuous financial condition.

Under Section 22.20(a) of the Rules, a motion for accelerated decision should be granted only if there are no issues of material fact to be tried and the party filing the motion is entitled to judgment as a matter of law. First, it should be noted that the prehearing exchange material relied on by Complainant in support of the motion cannot be used as factual matter supporting accelerated decision unless it is in an uncontested affidavit form. Reliance on reports or other material that are proposed exhibits is unacceptable because such material has not yet been admitted into evidence, nor verified by being sworn to as an affidavit must be.

And, since the Respondent has contested the alleged violation and has raised an ability to pay issue, there are genuine issues of material fact to be heard and are contested legal issues, both regarding liability and penalty amount. Under the above circumstances, the Complainant's Motion for Accelerated Decision should be, and hereby is, denied.

II. <u>Evidentiary Hearing</u>

The Prehearing Exchange in the above captioned proceeding has taken place and this case is ready to be set for evidentiary hearing. Complainant asks that the hearing be conducted in Chicago, where the EPA Regional Office is located. However, under Sections 22.19(d) and 22.21(d) of the Rules, the preferred location is Youngstown, Ohio, where the Respondent's business is situated. Accordingly, the hearing will be set in Youngstown.

As a result, the evidentiary hearing in this cause is hereby scheduled for 10:00 a.m. on Tuesday, April 5, 1994 in Youngstown, Ohio. The Regional Hearing Clerk is directed to secure a court reporter and an appropriate hearing facility in Youngstown for April 5 through April 8, 1994, and to advise the parties and the Presiding Judge of the hearing location as soon as possible, but no later than March 15, 1994.

Should either party need to request the issuance of subpoenas to compel the appearance of witnesses at the evidentiary hearing, any motion requesting such subpoenas must be filed by March 15, 1994, unless good cause can be established for a later request. Also, any motion requesting the issuance of subpoenas should be accompanied by a prepared original and two copies of any subpoena being sought. On any such subpoenas, the parties may leave the hearing location blank to be filled in by the Presiding Judge if the motion seeking subpoenas is granted.

SO ORDERED.

Daniel M. Head
Administrative Law Judge

Dated: February 7, 1994
Washington, DC

IN THE MATTER OF SENTCO PAINT MFG. CO., INC., Respondent
Docket No. IF&R-V-01-91

CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Motion for Accelerated Decision and Setting Evidentiary Hearing, dated February 7, 1994, was sent in the following manner to the addressees listed below:

Original by Regular Mail to:

A. Marie Hook
Regional Hearing Clerk
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604

Copy by Certified Mail, Return Receipt Requested to:

Counsel for Complainant:

Reginald A. Pallensen, Esquire
Office of Regional Counsel
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604

Representative of Respondent:

Rick Brothers
President
Sentco Paint Mfg. Co., Inc.
1301 N. Meridian Road
Youngstown, Ohio 44509

Aurora M. Jennings
Legal Staff Assistant
Office of the Administrative Law Judges

Dated: February 7, 1994
Washington, D.C.