

12/21/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
James B. Lawrence, Jr. and) Docket No. I.F & R.-04-8913
Discount Pool Supply and)
Services, Inc.,)
)
Respondents)

ORDER ON DEFAULT

This proceeding was initiated by the U.S. Environmental Protection Agency on June 27, 1989, by issuance of a complaint pursuant to section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, 7 U.S.C. § 1361(a). The complaint, which consists of two counts, charges Respondent James B. Lawrence in count I with violating section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1),^{1/} and 40 C.F.R. § 167.5(c)^{2/} by failing to

^{1/} Section 7(c)(1) of FIFRA provides:

Any producer operating an establishment registered under this section shall inform the Administrator within 30 days after it is registered of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides-

- (A) which he is currently producing;
- (B) which he has produced during the past year; and
- (C) which he has sold or distributed during the past year.

The information required by this paragraph shall be kept current and submitted to the Administrator annually as required under such regulations as the Administrator may prescribe.

^{2/} 40 C.F.R. § 167.5(c) (1988) provides: "Within 30 days of notification of registration of an establishment the producer (continued...)"

submit to EPA on or before February 1, 1988, the annual report on types and amounts of pesticides produced and/or distributed by the establishment which Respondent Lawrence operates. In the second count of the complaint, Respondent Discount Pool Supply and Services, Inc., is charged with failure to register the establishment as required by section 7(a) of FIFRA, 7 U.S.C. § 136e(a)^{3/}. Complainant proposes a civil penalty of \$800 for count I and \$1050 for count II, for a total civil penalty of \$1850.

Respondent Lawrence answered the complaint by handwritten undated letter around the beginning of August 1989, after a telephone conversation on July 5, 1989, with Consumer Safety Officer Mr. Bill Pfister, Pesticides and Toxic Substances Branch, EPA Region IV. Pursuant to that conversation, on July 7, 1989, Complainant sent Mr. Lawrence, by certified mail, forms and instructions for filing the 1987 and 1988 annual reports and for registering the establishment, along with a cover letter briefly explaining and requesting submission of the forms, and reminding

^{2/}(...continued)

[operating] the establishment shall file with the Agency a pesticide report. Thereafter reports are to be filed annually on or before February 1." On September 8, 1988 (53 Fed. Reg. 35058) 40 C.F.R. Part 167 was revised, effective August 9, 1989 (54 Fed. Reg. 32638), which was after the complaint was issued. The analogous provision in the new regulations is 40 C.F.R. § 167.85(d).

^{3/} Section 7(a) of FIFRA provides: "No person shall produce any pesticide subject to this subchapter or active ingredient used in producing a pesticide subject to this subchapter in any State unless the establishment in which it is produced is registered with the Administrator. The application for registration of any establishment shall include the name and address of the establishment and of the producer who operates such establishment."

him to file a written answer to the complaint. Mr. Lawrence completed the forms, which were received by EPA on August 2, 1989. Complainant's prehearing exchange, Exhibits 9 and 10. In the answer to the complaint as to count I, Respondent Lawrence asserts that he was not aware that the reports needed to be filed, and that mail addressed to "Steve's Discount Pool Supply, Inc.,"^{4/} was forwarded to the previous owner of the establishment, Steve Epstein. In response to count II, Mr. Lawrence asserts that he was using the labels of "Steve's Discount Sani-chlor" until he could afford to produce his own labels, and that he was unaware of any violation or requirement to register the establishment with EPA until he was contacted by Mr. Pfister. Mr. Lawrence stated that Mr. Pfister was to send information on how to register with EPA, but it was never received, and subsequently he received the complaint in this matter.

A letter was issued to the parties by the ALJ on November 14, 1989, directing them to submit prehearing exchange documents, including names of expected witnesses and copies of any documents or exhibits proposed to be offered at the hearing. Respondent Lawrence was also directed to explain in detail the agreement with

^{4/} Steve's Discount Pool Supply, Inc., registered with EPA as "Steven's Discount Pool Supply" through October 31, 1988, was purchased by Mr. and Mrs. Jay Lawrence on November 12, 1987. Complainant's prehearing exchange, Exhibit 7. The answer does not deny that Respondent Lawrence made this purchase, but states that Respondent Lawrence never operated as "Steve's Discount Pool Supply" as per agreement with the previous owner, and registered (presumably with the Florida Secretary of State) as "Discount Pool Supplies and Services, Inc."

Steve Epstein, or furnish a copy of the pertinent contract provision, providing that Respondent was not to operate under the name "Steve's Discount Pool Supply, Inc.;" to state the basis for the use of labels "Steve's Discount Pool Supply Sani-Chlor;" to state the date Respondent was first contacted by Mr. Bill Pfister and the date the product was registered with EPA; and if contending that the proposed penalty exceeds Respondents' ability to pay, to furnish financial statements or other data to support such contention.

The requirement for prehearing exchange was vacated on January 18, 1990, pursuant to a report that the Complainant had sent a settlement agreement for Respondents to sign. The requirement for prehearing exchange was reinstated by an order, dated March 19, 1990, due to a later report that settlement negotiations were unsuccessful. The parties were directed to file prehearing exchanges by April 30, 1990. Complainant timely filed its prehearing exchange, but no prehearing exchange documents have been filed by Respondents with the Regional Hearing Clerk to date. Consequently, Complainant submitted a motion for default (motion) pursuant to 40 C.F.R. § 22.17(a)(2), for Respondents' failure to file prehearing exchange documents. An affidavit of the Regional Hearing Clerk, dated August 3, 1990, affirming the Respondents' failure to file the prehearing exchange documents, accompanied the motion. The motion and proposed default order were served upon Respondents by certified mail on August 3, 1990, as evidenced by

the signature on the return receipt. No response to the motion has been received to date.

D I S C U S S I O N

The Rules of Practice, 40 C.F.R. Part 22, which govern proceedings for assessment of civil penalties under section 14(a) of FIFRA, provide in pertinent part of Rule 22.17(a) regarding default:

A party may be found to be in default . . .
(2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer

* * * *

The defaulting party shall have twenty (20) days from service to reply to the motion. Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations. If the complaint is for the assessment of a civil penalty, the penalty proposed in the complaint shall become due and payable by respondent without further proceedings sixty (60) days after a final order issued upon default.

* * * *

The prehearing letter, dated November 14, 1989, and the order, dated March 19, 1990, directing the parties to file prehearing exchange documents, are prehearing orders with which a party must comply or else be subject to a finding of default.

Complainant has established a prima facie case against Respondents through the documents and exhibits submitted in its prehearing exchange. Complainant has also provided evidence that the proposed civil penalty was properly determined in accordance with section 14(a) of FIFRA. Respondents' answer, asserting facts

which explain the circumstances surrounding Respondents' failure to file the required forms, does not demonstrate that Complainant has failed to establish a prima facie case nor does it provide justification for dismissal of the complaint as a matter of law. Respondents are charged with knowledge of the statutes of the United States and of the Federal regulations promulgated thereunder.^{5/} In the answer, Respondent Lawrence did not deny that he received the certified letter from EPA soliciting submission of the annual report. Answer, ¶ 5. Failure of Respondents to receive the required forms from EPA, and filing the required forms after the complaint was issued, do not provide a defense to liability. There is no condition in the regulations predicated on submittal of the forms on the receipt of them from EPA.^{6/}

For failure to file the prehearing exchange documents in accordance with the prehearing order dated March 19, 1990, Respondents are found to be in default in accordance with the Rules of Practice (40 C.F.R. § 22.17(a)). Such default constitutes an admission of all facts alleged in the complaint and a waiver of a hearing on the factual allegations.

^{5/} 44 U.S.C. 1508; Federal Crop Insurance Corporation v. Merrill, 332 U.S. 380, 384-385 (1947).

^{6/} Indeed, the current regulations specifically state that it is the ultimate responsibility of companies to obtain, complete and submit the pesticide report each year. 40 C.F.R. § 167.85(c).

FINDINGS OF FACT

1. Respondent James B. Lawrence, Jr., is a "person" as defined by section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.
2. The corporation known to EPA as "Steven's Discount Pool Supply," located at 5632 Johnson Street, Hollywood, Florida, was registered under EPA Establishment No. 52578-FL-1 through October 31, 1988. Steven's Discount Pool Supply was registered with the Florida Secretary of State's Office as "Steve's Discount Pool Supply, Inc."
3. Respondent Lawrence purchased Steve's Discount Pool Supply, Inc., on November 12, 1987.
4. On or about December 21, 1987, Respondent Lawrence, who was at that time operating the business located at 5632 Johnson Street, Hollywood, Florida, as a sole proprietorship, received via certified mail a letter from EPA Region IV soliciting submission of the annual "Pesticides Report for Pesticide-Producing Establishments," EPA Form 3540-16. Directions for completing this report were included and Respondent Lawrence was granted until February 1, 1988, to file the calendar year 1987 annual report of the establishment.
5. On or about July 24, 1988, Respondent Lawrence received via certified mail a letter from EPA Region IV constituting a "NOTICE OF INTENT TO TERMINATE ESTABLISHMENT REGISTRATION" for failure to submit the annual report as required by regulation.

6. As of May 10, 1989, Respondent Lawrence had failed to file the annual "Pesticides Report for Pesticide-Producing Establishments" for calendar year 1987.
7. Respondent Lawrence in his capacity as sole proprietor failed to submit to the EPA on or before February 1, 1988, the calendar year 1987 annual report consisting of information on the types and amounts of pesticides produced and/or distributed by the registered establishment, as required by section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167.5(c).
8. Respondent Discount Pool Supply and Services, Inc. (DPSS), is a Florida corporation located in Hollywood, Florida.
9. Respondent DPSS is a "person" as defined by section 2(s) of FIFRA, 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.
10. The place of business operated by DPSS at 5632 Johnson Street, Hollywood, Florida, is an "establishment" as defined by 40 C.F.R. § 167.1(b) and section 136(dd) of FIFRA, 7 U.S.C. § 136(dd).
11. Respondent Lawrence purchased Steve's Discount Pool Supply, Inc., on November 12, 1987, which was incorporated as DPSS on January 15, 1988.
12. Respondent DPSS is a "producer" as defined in section 2(w) of FIFRA, 7 U.S.C. § 136(w), and 40 C.F.R. § 167.1(d), and produces "Steve's Discount Pool Supply Sani-Chlor."

13. Said product is a pesticide within the meaning of section 2(u) of FIFRA, 7 U.S.C. § 136(u), and within the meaning of FIFRA regulations at 40 C.F.R. § 162.4. Said product is labeled in part "EPA Reg. No. 52578-2002, EPA Est. No. 52578-FL-1..." and bears directions for "swimming pool chlorination."
14. As of May 10, 1989, the establishment operated by DPSS, where said pesticide is produced, was not registered as required by section 7(a) of FIFRA, 7 U.S.C. § 136e(a), and was not registered as of the date of the complaint. The EPA Region IV Pesticides Branch Office received an application for Registration of Pesticides producing Establishment on or about August 2, 1989, for "Discount Pool Supplies and Services, Inc.," at 5632 Johnson Street, Hollywood, Florida.

CONCLUSIONS OF LAW

1. Respondents are in default for failing to comply with a prehearing order, and consequently all facts alleged in the complaint are deemed admitted and Respondents have waived the right to a hearing on such factual allegations.
2. Respondent Lawrence's failure to file the annual "Pesticide Reports for Pesticide-Producing Establishments" for calendar year 1987, as required by section 7(c)(1) of FIFRA, 7 U.S.C. § 136e(c)(1), and 40 C.F.R. § 167.5(c), is a violation of section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).
3. The failure of Respondent Discount Pool Supply and Services, Inc., to register as a pesticide-producing establishment, as

required by section 7(a) of FIFRA, 7 U.S.C. § 136e(a), is a violation of section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

4. The penalty of \$1850.00 proposed in the complaint was properly determined.

O R D E R

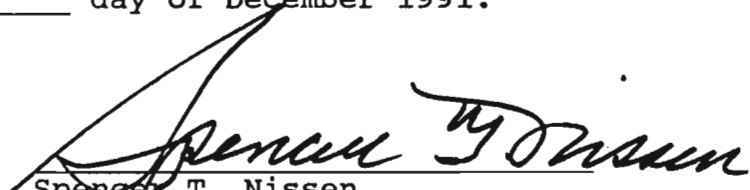
It having been determined that Respondents violated FIFRA as alleged in the complaint, a penalty of \$1850.00 is assessed against Respondents, James B. Lawrence, Jr. and Discount Pool Supply and Services, Inc., in accordance with section 14(a) of FIFRA, 7 U.S.C. § 136l(a).^{7/} The penalty shall be paid within sixty (60) days of receipt of this Order by the submission of a cashier's or certified check in the amount of \$1850.00 payable to the Treasurer of the United States, to the following address:

Regional Hearing Clerk
U.S. EPA, Region IV
P.O. Box 100142
Atlanta, Georgia 30384

^{7/} This Order constitutes an initial decision, which, unless appealed in accordance with section 22.30 of the Rules of Practice, (40 C.F.R. Part 22), or unless the Administrator elects sua sponte to review the same as therein provided, will become the final order of the Administrator in accordance with section 22.27(c).

Failure to make payment in accordance with this Order within the prescribed time frame shall result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 U.S.C. § 102.13.

Dated this 6th day of December 1991.


Spencer T. Nissen
Administrative Law Judge