

8/19/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Scotts-Sierra Crop)	Docket No. FIFRA-09-0864-C-95-03
Protection Company)	
)	
Respondent)	

ORDERS

The Region 9 office of the United States Environmental Protection Agency (the "Complainant," "EPA," or "Region") commenced this proceeding by filing a Complaint on January 26, 1996 against Scotts-Sierra Crop Protection Company (the "Respondent" or "Scotts-Sierra"), a corporation headquartered in Marysville, Ohio. Pursuant to an order by the undersigned Administrative Law Judge ("ALJ"), the Region filed a Second Amended Complaint (the "Complaint") on May 1, 1996. The Complaint charges Respondent with 157 counts of violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") in connection with sales of pesticide products from Respondent's facility located in Milpitas, California. The alleged violations occurred in 1992 and 1993, concerning sales of pesticides by the Grace-Sierra Crop Protection Company. In December 1993, that company was acquired by the Respondent Scotts-Sierra.

The Complaint charges Respondent with 157 violations of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A), selling an unregistered pesticide, and FIFRA §12(a)(2)(K), violating a pesticide cancellation order. The Complaint seeks a total civil penalty of \$785,000 on the basis of \$5000 for each alleged violation, the maximum authorized pursuant to FIFRA §14(a)(1), 7 U.S.C. §136l(a)(1). The Respondent filed its original Answer on March 4, 1996, and Answer to the Second Amended Complaint ("Answer") on May 22, 1996.

Complainant filed a Motion for Accelerated Decision with respect to Respondent's liability on June 4, 1996. Respondent then, on June 13, 1996, filed a consent motion to extend the time to reply to the Motion for Accelerated Decision. The ALJ granted that motion, establishing July 22, 1996 as the reply date. Complainant then filed a separate Motion to Strike Defenses on June 26, 1996.

Respondent then, on July 10, 1996, filed a Motion for Enlargement of Time in which to respond to Complainant's motions for accelerated decision and to strike defenses. Respondent seeks an extension until 60 days after EPA responds to a request for documents that Respondent made on July 10, 1996 pursuant to the

- First Affirmative Defense

Respondent's First Affirmative Defense alleges only that the Complaint fails to state a claim upon which relief may be granted. Since the Complainant has amended its original Complaint to clear up an ambiguity concerning the cancellation and registration status of the subject pesticides, the Complaint on its face does appear to state a valid claim for relief. Unless Respondent can supply some support for this defense, it will be considered stricken. A final ruling is reserved, however, until Respondent has had an opportunity to respond to the Complainant's motion to strike this defense.

- Second Affirmative Defense

Respondent's Second Affirmative Defense alleges that the Complaint fails to provide a statement of the reasoning behind the proposed penalty as required by 40 CFR §22.14(a)(5). The Complaint does contain a statement in Part II, entitled Proposed Civil Penalty (¶501) that is intended to satisfy this requirement. The Complaint then lists the 157 counts and the proposed penalty of \$5000 for each. Although couched in general terms, the statement in ¶501 is sufficient to meet the standard in the Rules of Practice. The Complaint refers to the statutory standards for determining a penalty amount under FIFRA and states that EPA applied its FIFRA Enforcement Response Policy. Such a statement has been found adequate to meet the requirement in 40 CFR §22.14(a)(5), provided the Respondent has a full and fair opportunity to contest the penalty assessment.¹

The usual practice in EPA administrative enforcement proceedings is to require a more detailed explanation of the penalty determination in the prehearing exchange. As discussed above, the penalty amount remains a major issue for adjudication. A statement of the reasoning behind the penalty, elaborating on that in the Complaint, will be required to be submitted by Complainant. This defense will not be stricken at this time, as Respondent has not had an opportunity to respond to Complainant's motion. However, in accord with the above discussion, it will be rendered moot and may be stricken upon Complainant's compliance with the prehearing exchange requirement to submit a more detailed explanation of the determination of the proposed penalty.

- Introduction to Answer

Complainant has moved to strike portions of an introduction or preamble to Respondent's Answer, as not authorized by the EPA Rules

¹ See In the Matter of Environmental Protection Corporation (East Side Disposal Facility), RCRA (3008) Appeal 90-1, 3 EAD 318, 322-323 (1990).

of Practice, and as raising improper defenses. I will not analyze each sentence in Respondent's preamble as urged by Complainant in its motion. The introduction is merely a summary of the defenses in the nature of argument. It is essentially redundant of the allegations in the actual defenses, but it is harmless since it is superseded by the Answer proper. It may remain as apparently intended -- as introductory argument -- but is not considered part of the formal Answer to the Complaint.

Ruling on Motion for Enlargement of Time

While the Complainant's Motion to Strike Defenses is largely disposed of by the above rulings, there remains Complainant's Motion for Accelerated Decision on liability, filed pursuant to 40 CFR §22.20(a). This motion is founded primarily on Respondent's admissions in its Answer to the main factual elements that constitute the alleged violations of selling an unregistered and cancelled pesticide. The pleadings thus seem to indicate that Respondent is relying on its affirmative defenses to support its position that it is not liable.

In any event, Respondent has not shown good cause to extend the time for its response until EPA responds to its FOIA request. It is immaterial that the prehearing exchanges have not yet occurred in this matter. Complainant has submitted with its motion all the evidentiary material it intends to rely on to support accelerated decision on liability. In order to defeat that motion, Respondent need only demonstrate the existence of a "genuine issue of material fact" concerning liability for the alleged violations. 40 CFR §22.20(a). All reasonable inferences from the submissions will be drawn in favor of the party opposing accelerated decision. At this stage a full exchange of evidence intended for weighing on the record of the hearing is unnecessary and inappropriate.

Respondent claims that it needs further evidence concerning Complainant's actions or inactions as described in the Answer's defenses, in order to respond to Complainant's motions. However, Respondent has not explained why this is so. The chronology of events seems fairly well established by correspondence, and the actions or inactions of the parties will generally speak for themselves. Respondent's FOIA request seeks "all records" of EPA concerning virtually all aspects of the proceeding. There is no specific indication how any such records, if there are any significant ones that Respondent does not already have, will aid Respondent in replying to the motion for accelerated decision.

Given the broad nature of Respondent's FOIA request, it is difficult to predict when it may be responded to or otherwise resolved. In its response to the motion for accelerated decision, Respondent may point out with more specificity any particular factual issue upon which it expects to receive further support through discovery on Complainant. Thus Respondent's motion for an

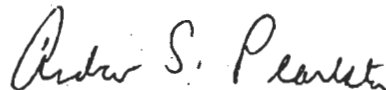
extension of time to respond until 60 days after EPA's complete FOIA response is denied. Respondent will, however, be allowed approximately 30 days from the date of this Order to respond, as directed below.

In its opposition to Respondent's motion, Complainant urges the ALJ to exercise control over Respondent's FOIA request in order to prevent Respondent from circumventing the standard discovery procedures provided for in the EPA Rules of Practice, 40 CFR §22.19. However, FOIA requires agencies to make requested records available to "any person" upon a proper request. 5 U.S.C. §552(a)(3). This obligation is wholly separate and apart from the discovery procedure in this administrative enforcement action. After determination of the pending motion for accelerated decision, discovery will proceed in accord with 40 CFR §22.19. I decline to exercise any discretion the ALJ may have under 40 CFR §22.01(c), as urged by Complainant, to monitor or control in any way the FOIA request made by the Respondent to the EPA.

Orders

1. Complainant's Motion to Strike Defenses is denied with respect to Respondent's Third through Seventh Affirmative Defenses.

2. Respondent will have until September 25, 1996 to respond to Complainant's Motion for Accelerated Decision on Liability. Also by that date, Respondent may respond to Complainant's Motion to Strike Defenses, with respect to Respondent's First and Second Affirmative Defenses.



Andrew S. Pearlstein
Administrative Law Judge

Dated: August 19, 1996
Washington, D.C.

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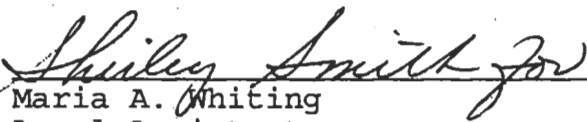
CERTIFICATE OF SERVICE

I certify that the foregoing Orders, dated August 19, 1996,
were sent by regular mail to the addressees listed below.

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Dated: August 19, 1996
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