

5/9/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
Hoops Agri-Sales Company,) Docket No. I.F.& R. -VII-1233C-93P
)
)
Respondent)

ORDER ON DEFAULT

On March 1, 1994, Complainant, U.S. Environmental Protection Agency, Region VII, filed a Motion for a Default Order against Hoops Agri-Sales Company (Respondent or Hoops), as a result of Hoops' failure to file a prehearing exchange as directed by the undersigned Administrative Law Judge (ALJ), by letter dated November 10, 1993. On December 1, 1994, I issued an order denying Complainant's request for a default order and granted Respondent additional time to provide the information specified in my letter of November 10. At the same time, I invited Complainant to resubmit its motion for a default order, if Respondent failed to respond within the additional time. To date, Respondent has failed to respond in any way to my order directing it to provide the specified information; whereas, Complainant has resubmitted its motion for a default order. Accordingly, I find, based on the entire record in this matter, that Complainant has established its *prima facie* case with respect to Counts I and III, and that

Respondent, by its failure to submit its prehearing exchange, is in default. I hereby grant Complainant's motion for a default order.^{1/}

This proceeding for the assessment of a civil penalty was initiated on May 27, 1993, by the Region VII office of the U.S. Environmental Protection Agency (EPA or Complainant) against Respondent, pursuant to Section 14 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (FIFRA or the Act), 7 U.S.C. § 1361. The complaint charged Respondent with three (3) counts of violating the Act. Counts I and II alleged that Hoops failed to maintain proper documentation evidencing the sale of restricted use pesticides (RUPs) as required by the Act. Specifically, Count I alleged that Invoice No. 28587, dated June 21, 1991, and Invoice No. 30348, dated August 22, 1992, reflecting the sales of the RUPs "LASSO EC," and "LASSO EC" and "AATREX 4L," to Gary Mitties and Larry Flamme, respectively, failed to contain the products' EPA registration numbers, the purchasers' certification numbers and the dates of expiration of the certification numbers as required by 40 C.F.R. § 171.11(g)(2)(i)(B) and (C). For this alleged violation, it was proposed to assess Hoops a penalty of \$5,000.

Count II alleged that RUP application records, Invoice Nos. 28594 and 28595, dated June 21, 1991, for the sale of "BLADEX

^{1/} Pursuant to 40 C.F.R. § 22.17, this Default Order 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.

90DF," to Bob and Ed Nesladek and the blend sheet, dated June 19, 1991, failed to contain the EPA registration number, the complete location and time of the pesticide application and the target pest, as required by 40 C.F.R. § 171.11(c)(7)(i)(B), (C), (E), and (F). No separate penalty was demanded for this alleged violation.

As I pointed out in my order denying Complainant's original motion for a default order, Count II is problematic in that the regulation allegedly violated--40 C.F.R. § 171.11(c)(7)--delineates reporting requirements for certified commercial applicators; whereas, R. Douglas Hoops was admittedly only a certified private applicator. (See, Order Denying Motion for Default, December 1, 1994, Note 1). While Respondent's actions may constitute a violation of other requirements, clearly, Respondent can not be charged with violation of reporting requirements that apply only to certified commercial applicators. Accordingly, this default order concerns only Counts I and III of the complaint.

Count III, while alleging erroneously that the application occurred on June 19, 1992 (the correct date apparently being June 21, 1991), concerned the application, referred to in Count II, of BLADEX 90DF to a corn field operated by Bob and Ed Nesladek. The complaint alleged that the application was made by Respondent's employee, R. Douglas Hoops, in his capacity as a commercial applicator, but that he was certified only as a private applicator. The complaint further alleged that the application was not made under the supervision of a certified commercial applicator.

For this alleged violation, Complainant proposed to assess Hoops a penalty of \$5,000.

In a letter-answer, dated June 17, 1993, signed by Mr. Robert A. Hoops, Hoops disputed certain facts alleged in the complaint and contested the amount of the penalty as excessive. Hoops claimed that the missing information was contained in a notebook which had been misplaced on the day of the inspection. Regarding Count III, Hoops stated that the date of the application of the pesticide, as alleged in the complaint, was erroneous, and that he was under the impression that a private applicator could apply RUPs for others.

Based on Respondent's claims in its answer and the potential defenses that such claims raised, I denied Complainant's original motion for a default order. Nevertheless, in light of Respondent's failure to respond to the original prehearing exchange order of November 10, 1993, as well as the order of December 1, 1994, and its failure to file its prehearing exchange and to provide supporting information for its claims, I find Respondent to be in default. Respondent's answer to the complaint does not raise any matter which could support a decision that Complainant has failed to establish a *prima facie* case (with respect to Counts I and III) or could justify the dismissal of the complaint.

The following findings of fact and conclusions as to issues of liability and penalty are made pursuant to Section 22.17(c) of the Consolidated Rules, 40 C.F.R. Part 22, and are based on the entire record including Complainant's proposed findings and conclusions.

FINDINGS OF FACT AND CONCLUSIONS

1. This is a civil administrative action initiated pursuant to Section 14 of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA), 7 U.S.C. § 1361.

2. The Complainant, by lawful delegation from the Administrator of EPA, and the Regional Administrator, EPA, Region VII, is the Director of the Air and Toxics Division, EPA, Region VII.

3. The Respondent is Hoops Agri-Sales Company, West Highway 30, North Bend, Nebraska, a pesticide dealer and certified applicator. Hoops Agri-Sales Company is a "person," as defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

4. On or about January 25, 1993, a representative of EPA conducted a dealer and certified applicator inspection at Respondent's facility in North Bend, Nebraska, and obtained documentary samples pertaining to Respondent's sale and application of restricted use pesticides.

5. Sales Invoice No. 28587, dated June 21, 1991, for the sale of LASSO EC, a restricted use pesticide, to Gary Mitties failed to contain the product's EPA registration number, Mr. Mitties' certification number, and the date of expiration of the certification number.

6. Sales Invoice No. 30348, dated August 22, 1992, for the sale of LASSO EC and AATREX 4L to Larry Flamme, failed to contain the products' EPA registration numbers, Mr. Flamme's certification number, and the date of expiration of the certification number.

7. Section 136w(a) of FIFRA, 7 U.S.C. § 136w, authorizes the Administrator of EPA to prescribe regulations to carry out the provisions of Subtitle II of FIFRA.

8. 40 C.F.R. § 171.11(g)(2)(i)(B) and (C)² were promulgated by the Administrator pursuant to Section 136w(a) of FIFRA, 7 U.S.C. § 136w. Failure to comply with these provisions is a violation of Section 12(a)(2)(B)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i).

9. Respondent's failure to maintain records containing the information required by 40 C.F.R. § 171.11(g)(2)(i)(B) and (C) for sales of RUPs to Gary Mitties (Sales Invoice No. 28587) and Larry

² 40 C.F.R. § 171.11(g)(2)(i)(B) and (C) provide in part that:

(i) *Certified applicators.* Each restricted use pesticide retail dealer shall maintain at each individual dealership records of each transaction where a restricted use pesticide is made available for use by that dealership to a certified applicator. Record of each such transaction shall be maintained for a period of 24 months after the date of the transaction, and shall include the following information:

.....

(B) The certification number on the document evidencing that person's certification, the State (or other governmental unit) that issued the document, the expiration date of the certification, and the categories in which the applicator is certified, if appropriate.

(C) The product name, EPA registration number, and the State special local need registration number, granted under section 24(c) of the FIFRA (if any) on the label of the pesticide.

Flamme (Sales Invoice No. 30348) constitutes a violation of Section 12(a)(2)(B)(i) of FIFRA, 7 U.S.C. § 136j(a)(2)(B)(i).

10. The restricted use pesticide application records for Bob and Ed Nesladek, Invoice Numbers 28594 and 28595, dated June 21, 1991, and blend sheet, dated June 19, 1991, failed to contain the EPA registration number of Bladex 90DF, the complete location of the pesticide application, target pest, and the time of application.

11. On or about June 21, 1991 (the complaint erroneously indicated June 19, 1992); Respondent's employee R. Douglas Hoops, while acting within the course and scope of his employment with Hoops Agri-Sales, used and applied 167.5 pounds of BLADEX 90DF, a restricted use pesticide, to Bob and Ed Nesladek's corn acreage in North Bend, Nebraska.

12. R. Douglas Hoops is certified as a private applicator as defined at Section 2(e)(2) of FIFRA, 7 U.S.C. § 136(e)(2), and 40 C.F.R. § 171.2(a)(20) under Nebraska certification number NE754564.

13. R. Douglas Hoops is not certified as a commercial applicator as defined at Section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3) and 40 C.F.R. § 171.2(a)(9), nor did he apply the RUP, BLADEX 90DF, under the direct supervision of a certified commercial applicator.

14. Sections 3(d)(1)(C)(i) and (ii) of FIFRA, 7 U.S.C. § 136a(d)(1)(c)(i) and (ii), state that a restricted use pesticide shall be applied for any use to which the restricted use classification applies only by or under the direct supervision of

a certified applicator. 40 C.F.R. § 171.2(a)(8) defines "certified applicator," as any individual who is certified to use or supervise the use of any restricted use pesticides covered by his certification.

15. Respondent's action in making available for use the BLADEX 90DF referred to in paragraph 11 above to R. Douglas Hoops for commercial use and application was not in accordance with Section 3(d) of FIFRA, 7 U.S.C. § 136a(d), in that Mr. Hoops was not certified to use restricted use pesticides as a commercial applicator. Respondent's action constituted a violation of Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F).^{2/}

^{2/} Section 136j(a)(2)(F) of FIFRA provides, in part, that:

(2) It shall be unlawful for any person --

.....

(F) to distribute or sell, or to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with section 136a(d) of this title and any regulations thereunder,

.....

16. On July 15, 1993, this matter was assigned to the undersigned ALJ, and by letter, dated November 10, 1993, the ALJ directed the parties to exchange prehearing information⁴ on or before January 28, 1994, and directed Complainant to file a statement on or before January 7, 1994, as to whether this matter had been or would be settled.

17. On January 6, 1994, Complainant advised the ALJ that the parties had discussed settlement and that, if Respondent provided certain financial information, Complainant believed the matter could be settled.

⁴ Respondent was directed to provide the following information and/or documents:

1. If notebook, referred to in answer, used to record customer certification number and date of expiration, listings of product registration numbers, and restricted use pesticides and their registration numbers has been located, provide a copy.
2. Provide a copy of commercial certification for Robert A. Hoops and for your employee, R. Douglas Hoops.
3. Explain statement in letter-answer that date of application referred to in Count III of complaint is incorrect.
4. If Respondent is contending proposed penalty would adversely effect its ability to continue in business, furnish financial statements, copies of income tax returns or other evidence to support such contention.

18. Respondent failed to provide the requested financial information to Complainant, and on January 28, 1994, Complainant filed its prehearing exchange.

19. Respondent failed to file its prehearing exchange or request an extension of time to do so.

20. On March 1, 1994, Complainant filed a motion for a default Order

21. On December 1, 1994, the ALJ issued an order denying Complainant's request for a default order. Based on Hoops' claims that it had potential defenses to the alleged violations and that the proposed penalty did not comport with the sales category in which Respondent should be placed, the ALJ concluded that Respondent should be given additional time until December 29, 1994 to comply with the requirement for a prehearing exchange. In the event of Respondent's failure to provide the demanded information, Complainant was invited to renew its motion for a default order.

22. Respondent failed to comply with the ALJ's order of December 1, 1994, and on January 9, 1995, Complainant renewed its motion for a default order.

23. Respondent has (1) failed to comply with the prehearing order of November 10, 1993, (2) failed to respond to Complainant's motion for a default order, (3) failed to comply with the order of December 1, 1994, and (4) failed to respond to the renewal of

Complainant's motion for a default order. Therefore, I find Respondent in default pursuant to 40 C.F.R. 22.17(a).^{2/}

24. Pursuant to 40 C.F.R. § 22.17(a), Respondent's default constitutes an admission of all the facts alleged in the complaint and a waiver of Respondent's right to a hearing on such factual allegations.

PENALTY

Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1), authorizes the Administrator of EPA to collect a civil penalty in administrative penalty actions of up to \$5,000 for each violation of FIFRA.^{3/} Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4), requires that EPA consider the appropriateness of the penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. The FIFRA Enforcement Response Policy (ERP), dated

^{2/} As indicated above, this default is limited to the facts and allegations contained in Counts I and III of the complaint.

^{3/} Section 14(a)(1) of FIFRA, 7 U.S.C. § 1361(a)(1), provides:

(1) In general.--Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than \$5,000 for each offense.

July 2, 1990, provides a five-step penalty computation process (or matrix) that considers the factors required by Section 14(a)(4) of FIFRA. The ERP matrix was used to calculate the civil penalty assessed against Respondent.

Based on its assessment of the factors required to be considered by Section 14(a)(4) of FIFRA and the ERP, Complainant proposed to assess a penalty of \$10,000 against Respondent. This penalty was split equally between Counts I and III for which Complainant assessed penalties of \$5,000 each based on the gravity of the violations and the size of Respondent's business. There was no claim by Respondent that the penalty would compromise its ability to continue in business. No penalty was assessed against Respondent for the violation alleged in Count II of the complaint, apparently because the regulation that allegedly was violated in Count II applies to commercial applicators.

Although Respondent indicated in its answer that the proposed penalty was excessive in light of the size of its business, Respondent has failed to provide any information to refute Complainant's calculation of the penalty. In calculating the size of Respondent's business, Complainant reasonably relied on the only information available to it, namely, the Dun and Bradstreet report which indicated that Respondent's projected sales for the year in question were between \$900,000 - \$1,000,000. There is nothing in

the record to refute this information. Moreover, Complainant's determination that the violations warranted a gravity level of 2 is a reasonable assessment based on the ERP. Accordingly, I conclude, based on the entire record, that Complainant has properly considered the factors delineated in the Act and the ERP, and the civil penalty of \$10,000 assessed against Respondent is appropriate.

ORDER¹

IT IS ORDERED, pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, that Respondent, Hoops Agri-Sales Company, be assessed a civil penalty of \$10,000 for violation of 40 C.F.R. § 171.11(g) and Section 12(a) of FIFRA, 7 U.S.C. § 136j(a).

Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days of the date of this order:

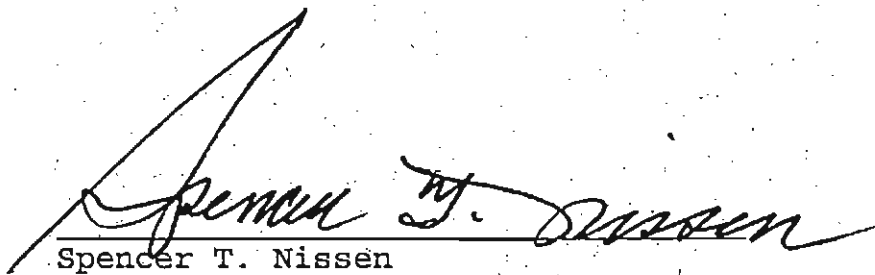
U.S. Environmental Protection Agency, Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, PA 15251

¹ Pursuant to 40 C.F.R. § 22.17(b), this order constitutes an Initial Decision. Unless an appeal is taken pursuant to 40 C.F.R. § 22.30(a) or the Environmental Appeals Board elects to review this decision, *sua sponte*, pursuant to 40 C.F.R. § 22.30(b), this order shall become the final order of the Environmental Appeals Board in accordance with 40 C.F.R. § 22.27(c).

A transmittal letter, giving Respondent's name, complete address, and Docket No. VII-1233C-93P, must accompany the payment. A copy of the check and transmittal letter shall also be mailed to the Regional Hearing Clerk at the following address:

U.S. Environmental Protection Agency
Regional Hearing Clerk, Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

Dated this 9th day of May 1995.


Spencer T. Nissen
Administrative Law Judge