

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

)	
In re:)	
)	
Flying Lion, Inc.)	
d/b/a Round-Up Crop Dusters)	FIFRA Appeal No. 98-1
)	
Docket No. 10-95-0090 FIFRA)	
)	

ORDER DISMISSING APPEAL

Respondent, Flying Lion, Inc., d/b/a Round-Up Crop Dusters ("Respondent"), appeals from an Initial Decision issued by Administrative Law Judge Carl C. Charneski ("Presiding Officer") dated December 9, 1997. The Initial Decision assesses a civil penalty of \$700 for two violations of Section 12(a)(2)(g) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(2)(g). Respondent appealed the Initial Decision on February 3, 1998. The timeliness of the appeal is central to our disposition of this matter.

The complaint in this matter involves an aerial pesticide spray operation conducted in an area near the Klamath National Wildlife Refuge to control the outbreak of grasshoppers. Respondent contracted with the Department of Agriculture to apply the registered pesticides, Fyfanon ULV Concentrate Pesticide and De-Bug 5% Carbaryl Bait, to rangelands in the area. Respondent applied the pesticides on July 1 and 4, 1994.

Based on sampling data and observation of the spray areas, U.S. EPA Region X charged Respondent with 2 violations of Section 12(a)(2)(g) of FIFRA which prohibits the use of a registered pesticide in a manner inconsistent with its labeling. On December 9, 1997, after a hearing on October 29 and 30, 1996, the Presiding Officer found Respondent liable for the two alleged violations and imposed a civil penalty of \$700. See Initial Decision.

The Initial Decision was served on Respondent by first class mail on December 10, 1997, rather than via certified mail, return receipt requested, as required by 40 C.F.R. § 22.06. The Regional Hearing Clerk resent the initial decision via certified mail, return receipt requested, on December 18, 1997, to cure the defect of the first service. After two delivery attempts on December 20 and 27, 1997, the Post Office returned the certified mail to the Regional Hearing Clerk on January 4, 1998.

The Regional Hearing Clerk contacted Respondent's owner, Mr. Childers,¹ by telephone on January 6, 1998, to find out why he had not picked up the certified mail. She learned that Mr. Childers did not pick up the certified mail because he had received the December 10, 1997 first class mailing. The Regional

¹Respondent is represented, *pro se*, by Dennis L. Childers, owner of Flying Lion, Inc., d/b/a Round-Up Crop Dusters. Initial Decision at 10. Mr. Childers represented Respondent throughout the proceedings below.

Hearing Clerk informed Mr. Childers that a signed return receipt was necessary for her records, and she mailed one to him on the day she spoke to him, January 6, 1998. She did not send another Initial Decision since Mr. Childers stated he had previously received the original with the first class mailing. Mr. Childers received and signed the return receipt on January 12, 1998.

The facts set forth above establish that Respondent's appeal is untimely. Section 22.07(c) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits ("Consolidated Rules") sets forth that, except for complaints, service of "all other pleadings and documents is *complete upon mailing.*" (Emphasis added.) Here, service of the Initial Decision was completed on December 18, 1998, when the Regional Hearing Clerk mailed the Initial Decision via certified mail, return receipt requested, to Respondent's *pro se* representative, Mr. Dennis Childers.²

Section 22.30 states, in part, that any party may appeal an

²For purposes of this case, it is irrelevant that Respondent did not pick up the December 18, 1997 mailing. Service is complete upon mailing the document, not upon receipt. See 40 C.F.R. § 22.07(c); see also *In re Outboard Marine Corp.*, 6 E.A.D. 194, 197 (EAB 1995) (rejecting "rule whereby the date of receipt of an initial decision triggers the twenty-day appeal period"). No prejudice results from application of this rule because Respondent admitted he was in receipt of the December 10, 1997 first class mailing. See Respondent's Response to EPA Motion to Dismiss Appeal.

adverse ruling "by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board * * * within twenty (20) days after the initial decision is served upon the parties." 40 C.F.R. § 22.30(a)(1). In addition, "[w]here a pleading or document is served by mail, five (5) days shall be added to the time allowed by these rules for the filing of a responsive pleading or document." 40 C.F.R. § 22.07(c). As noted above, the Initial Decision was served on December 18, 1997. Therefore, the deadline for filing an appeal with the Board was January 12, 1998.³ Respondent filed its Notice of Appeal with the Board on February 3, 1998.

We are mindful that Respondent is represented *pro se*, by Mr. Dennis Childers, and should not necessarily be held to the strictest letter of the Consolidated Rules. See *In re Occidental Chemical and Agricultural Products*, 2 E.A.D. 30, 33 (JO 1985) ("[A] *pro se* party * * * must be given reasonable latitude"). However, we have also noted that "a litigant who elects to appear *pro se* takes upon himself * * * the responsibility for complying with the procedural rules and may suffer adverse consequences in the event of noncompliance." See *In re Rybond, Inc.*, 6 E.A.D. 614, 627 (EAB 1996).

Accordingly, Respondent's appeal is dismissed and Respondent is hereby ordered to pay the full amount assessed in the Initial

³Twenty-five (25) days after December 18, 1997.

Decision (\$700) within sixty (60) days after receipt of this order unless otherwise agreed upon by the parties. Payment shall be made by forwarding a cashier's check or certified check

payable to the Treasurer, United States of America, and mailed
to:

U.S. EPA Region X (Regional Hearing Clerk)
Mellon Bank
P.O. Box 36903
Pittsburgh, Pennsylvania 15251

So ordered.

Dated:

ENVIRONMENTAL APPEALS BOARD

By: _____/s/_____
Ronald L. McCallum
Environmental Appeals Judge

Dated: 12/16/98

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Order Dismissing Appeal in the matter of Flying Lion, Inc. d/b/a Round-Up Crop Dusters, FIFRA Appeal No. 98-1, were sent to the following persons in the manner indicated:

By Certified Mail
Return Receipt Requested:

Dennis L. Childers
P.O. Box 1451
Pendleton, Oregon 97801

Adan Schwartz
Assistant Regional Counsel
U.S. EPA Region X
1200 Sixth Avenue ORC-158
Seattle, Washington 98101

Dated: 12/16/98

_____/s/_____
Annette Duncan
Secretary