7/7/95

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
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| Haveman Grain Company, Inc., and Dan Haveman, | ) | Docket No.I.F. & R.-VII-1211C-93P |
| | ) | |
| | ) | |
| Respondents | ) | |

**ORDER GRANTING IN PART MOTION FOR ACCELERATED DECISION**

The complaint in this proceeding under Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) (7 U.S.C. § 136j(a)(2)(G)), issued on February 19, 1993, charged Respondents, Haveman Grain Company, Inc. (Haveman Grain) and Dan Haveman, with using registered pesticides in a manner inconsistent with their labeling. The complaint charges Respondents with applying pesticides limited for use only on specified crops to a non-crop site.[1/] This type of violation is classified as level "2" according to the Enforcement Response Policy for FIFRA (1990) and it was proposed to assess Respondents the maximum penalty of $5,000 permitted by the Act. Section 14 of FIFRA, 7 U.S.C. § 136l.

In a letter - answer, dated March 30, 1993, signed by Loren Haveman, owner, Mr. Haveman stated: "Last year after the planting season was over we were getting our bulk chemical tanks winterized. The tanks, which had Extrazine, Prowl, and Pursuit Plus in them,

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[1/] The following pesticides were allegedly applied: EXTRAZINE II 4L, BLADEX 4L, PROWL, PURSUIT, WEEDONE LV4, and HERBICIDE A-4D.

were rinsed with about 100 gallons of water and then we added 2,4-D. We sprayed this rinse water on an area around our elevator to control weed growth . . ." Haveman asserted that despite the incorrect use of the pesticides, "no harm [was done] to the environment." The letter further stated that Haveman Grain is a small family business, thereby implying that the penalty sought would have a detrimental impact on the future of the business. Haveman requested a hearing.

Subsequent to a prehearing exchange order by the ALJ, Respondents retained counsel, who filed an amended answer in the form of a general denial of all violations in Section III of the complaint. This amended answer additionally alleged the proposed penalty was excessive and confiscatory. Respondents requested a hearing.

Complainant filed its prehearing exchange in accordance with the Order. Respondents also complied with the requirements of the Order, except for filing the materials nine days after the extended November 15, 1993 deadline.

On February 14, 1994, Complainant filed a Motion for Accelerated Decision pursuant to 40 C.F.R. § 22.20 and a memorandum in support thereof (motion). The motion alleges, generally, that no genuine issue of material fact exists with respect to liability and therefore Complainant is entitled to judgment as a matter of law. Specifically, Complainant makes two allegations: (1) Haveman Grain and Dan Haveman, as applicator, used registered pesticides in a manner inconsistent with their labeling and (2) the proposed

penalty is appropriate. Accordingly, Complainant requests issuance of an accelerated decision finding Respondents in violation of FIFRA and assessing a penalty of $5,000.

Complainant supports the assertion that no genuine issue of material fact exists by pointing out that the amended answer filed by Respondents' counsel raised no factual allegations to dispute the admissions made in the original answer. The amended answer was a mere general denial which is not in accordance with the Rules of Practice (40 C.F.R. § 22.15(b)), because it fails to "clearly and directly admit, deny, or explain each factual allegation contained in the complaint." Complainant asserts that Haveman's initial admissions support the conclusion that no genuine issue of material fact exists.

As support for the allegation that registered pesticides were not used in the manner prescribed by their labels, Complainant relies on the admissions in Haveman's original answer as well as soil samples taken from the non-crop site, which confirmed residues of atrazine, cyanazine, pendimethlin, imazethapyr and 2,4-D. Atrazine and cyanazine are the active ingredients in EXTRAZINE II 4L; cyanazine is the active ingredient in BLADEX 4L; pendimethlin is the active ingredient in PROWL; imazethapyr is the active ingredient in PURSUIT; 2,4-D is the active ingredient in WEEDONE LV4 and HERBICIDE A-4D. EXTRAZINE II 4L, BLADEX 4L, PROWL and PURSUIT, as indicated on their labels, are limited for use on

specific crops.[2/]

Finally, in support of the assertion that the proposed penalty is appropriate, Complainant points out that FIFRA § 14(a)(1) permits assessment of a civil penalty for any violation of a provision of the Act. Complainant alleges that the proposed penalty was determined in accordance with the guidelines for the assessment of civil penalties as established in the 1990 FIFRA Enforcement Response Policy, that a violation of FIFRA §12(a)(2)(G) is a level "2" violation (Appendix "A", the FIFRA Charges and Gravity Levels), that the size of business is classified as Category I based on Haveman Grain's 1991 income tax return, and lastly that Respondents have not supplied any financial statements to refute the size of business category or ability to continue in business. Complainant also contends that the percentage variation based on gravity adjustments is zero. For these reasons, Complainant maintains that the proposed penalty of $5,000 is proper and should be assessed against Respondents.

Complainant's prehearing exchange contains a "Use/Misuse" investigation report by Environmental Protection Specialist, David S. Horak, dated July 22, 1992 (C's Prehearing Exh. 2), which includes a summary of an interview with Mr. Dan Haveman, held on July 6, 1992. Mr. Haveman is quoted as stating that the incident referred to in the complaint was not a pesticide application, but

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[2/] EXTRAZINE II 4L-corn and sweet corn; BLADEX 4L-corn, sweet corn, cotton, grain sorghum; PROWL-cotton, edible beans, field corn, grain sorghum, nonbearing nut/fruit crops and vineyards, peanuts, potatoes, rice, soybeans, sunflowers, sweet corn, tobacco; PURSUIT-soybeans.

a "rinsate disposal" and for that reason no records of the disposal were maintained. It appears that Respondent places rinsate from containers as a result of customer applications into bulk tanks at its elevator. Mr. Haveman is quoted as saying that rinsate from the bulk tank was mixed with approximately 300 gallons of water and applied to the parking area, vegetated river banks, and grassy areas at the Rockbluff Elevator, Plattsmouth, Nebraska. This property is owned by Respondent, Haveman Grain Company, Inc. Copies of labels in the record for the pesticides in the rinsate are incomplete and do not include directions for disposal. The label for PROWL, however, states "Do Not contaminate water by cleaning of equipment or disposal of wastes" (C's Prehearing Exh. 15) and the label for PURSUIT states that "Wastes resulting from the use of this product may be disposed of on site or at an approved waste disposal facility" (C's Prehearing Exh. 16). "On site" in this context means a site for the application of the pesticide, which is consistent with the label.

On April 7, 1994, Complainant filed a Motion for Order on Accelerated Decision. To date, Respondents have failed to respond to Complainant's Motion for Accelerated Decision or the mentioned Motion for Order.

## D I S C U S S I O N

Although Respondents' amended answer to the complaint was not made in accordance with 40 C.F.R. § 22.15(e), this omission does not necessarily preclude it from becoming a valid part of the record. Motions to amend are liberally granted. The U.S. Supreme

Court held in Conley v. Gibson, 355 U.S. 41, 48 (1957) that "[t]he Federal Rules reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome . . ." and instead "accept the principle that the purpose of pleading is to facilitate a proper decision on the merits."[3/] It is unlikely that the motion to amend would have been denied had it been properly made. Therefore, the amended answer will be considered.

It has long been the rule that, upon the filing of an amended complaint, the original complaint is superseded and is of no legal effect. Washer v. Bullitt, 110 U.S. 558 (1884). No reason is apparent why the same rule does not apply to answers. The original answer having been superseded, it is of no legal effect and Complainant's reliance on that pleading as support for its motion is misplaced.

Available evidence, however, supports the conclusion that Respondents used or applied the pesticides identified in the complaint in a manner inconsistent with label directions. For example, labels for the restricted use pesticides (RUPs) EXTRAZINE II 4L and BLADEX 4L limit their uses to specific crops. (supra note 2). Additionally, the label for PROWL limits the use of this pesticide to specific crops. (Id.) The use of PURSUIT appears to be limited to fields intended for the planting of

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[3/] See also, Yaffe Iron & Metal Company, Inc., v. U.S. Environmental Protection Agency, 774 F.2d 1008, 1012 (10th Cir. 1985) (administrative pleadings are intended to be "'liberally construed' and 'easily amended'").

soybeans. There is no dispute, but that the pesticide application referred to in the complaint were to non-crop sites and were not on land intended for the planting of soybeans.

Terms not specifically defined by the regulations should be interpreted "as taking their ordinary, contemporary, common meaning[s]." Perrin v. United States, 444 U.S. 37, 42 (1979). Webster's Third New International Dictionary 105 (1981) defines "apply" as "to put to use especially for some practical purpose" and "to . . . lay or spread on." Although Respondents contend that they were disposing of rinsate rather than applying pesticides, their actions, by the very definition of the term, equate to an application.

Apart from the initial answer, which may not be considered, there is no evidence that the application/disposal was for pesticidal purposes, that is, control of weeds. It is considered, however, that such a purpose may be inferred from the areas to which the rinsate was applied. Be that as it may, Respondents' actions as rinsate or pesticide disposal were almost certainly not in accordance with label directions. Although the only label in the record which contains directions for disposal is that for PURSUIT, it is unlikely that the directions for disposal on the labels of the other pesticides in the rinsate, two of which were RUPs, differ in any significant manner. As we have seen, the label for PURSUIT provides that "[w]astes resulting from the use of this product may be disposed of on-site or at an approved waste disposal facility." "On-site" in this context means a site for the

application of pesticides which is in accordance with label directions and it is clear that Respondents' actions, viewed as a disposal, were not in accordance with label directions.

A motion for accelerated decision is properly granted when "no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding." 40 C.F.R. § 22.20; accord Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247 (1986). Once the moving party meets the initial burden of establishing the nonexistence of a genuine issue, the burden shifts to the nonmoving party to demonstrate the existence of a genuine issue for trial. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It is concluded that there is no genuine issue of material fact, but that Respondents used or applied pesticides in a manner inconsistent with their labeling as charged in the complaint and that Complainant is entitled to a judgment in its favor as to liability.

A different ruling is, however, required as to the motion for summary judgment on the penalty. Section 14(a)(4) of FIFRA (7 U.S.C. 136l) provides that amongst the factors the Administrator is required to consider in determining the amount of a penalty is the "gravity of the violation." "Gravity of the violation" is considered from two aspects, i.e., "gravity of the harm and gravity of the misconduct." See In re James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2 (EAB, December 6, 1994). It is obvious that there may well be factual issues involved in determining the harm or potential for harm from the misuse of a particular pesticide.

It is also clear that the gravity of the misconduct may not be separated from Respondents' good faith, which is inherently a factual matter not appropriate for resolution on summary judgment. In this instance, Respondents assertedly were engaged in rinsate disposal rather than pesticide application and may well have been under the impression that the disposal was either authorized by the labels or did not significantly differ therefrom. Moreover, it has been held that determining the amount of a penalty on a motion for accelerated decision, no less than determining damages on summary judgment, is, seldom, if ever, appropriate. See, e.g., The Monte Vista Cooperative, Docket No. I. F. & R.-VIII-91-296C (Order, June 10, 1992). This is especially true where, as here, the amount of the penalty is controverted and may have an impact on the survival of the business. Complainant's motion for accelerated decision as to the amount of the penalty will be denied.

O R D E R

1. Complainant's motion for an accelerated decision as to liability is granted.

2. The motion insofar as it seeks summary judgment for the penalty claimed is denied. The amount of the penalty remains at issue and will be determined, after further proceedings, including a hearing, if necessary.[4/]

Dated this 7th day of July 1995.

Spencer T. Nissen
Administrative Law Judge

[4/] It is my conclusion that this matter should be settled. The parties' attention is invited to the President's memorandum Regulatory Reform - Waiver of Penalties and Reduction of Reports, 60 Fed. Reg. 20621 (April 26, 1995) and E.P.A.'s implementation thereof, Interim Policy on Compliance Incentives for Small Businesses, 60 Fed. Reg. 32675 (June 23, 1995).

**CERTIFICATE OF SERVICE**

This is to certify that the original of this **Order Granting In Part Motion For ACCELERATED DECISION**, dated July 7, 1995, in re: Haveman Grain Company, Inc. and Dan Haveman, I.F. & R. Dkt. No. VII-1211C-93P, was mailed to the Regional Hearing Clerk, Reg. VII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Mari Whiting for
Helen Handon

DATE: July 7, 1995

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