



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY



REGION 10
 Seattle, Washington

IN THE MATTER OF:)
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 KELLY MARKS, dba HAPPY TRAILS)
 MANUFACTURING)
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) DOCKET NO. 1094-06-09-012
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INITIAL DECISION AND DEFAULT ORDER

By Motion for Default Judgment dated July 6, 1995, Complainant, the United States Environmental Protection Agency, Region 10, moved for an Order assessing a civil penalty in the amount of five thousand four hundred dollars (\$5400) against Respondent, Kelly Marks, dba Happy Trails Manufacturing. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("Consolidated Rules") at 40 C.F.R. Part 22 and based upon the record in this matter and the following Findings of Fact, Conclusions of Law, and Determination of Civil Penalty Amount, Complainant's Motion for Default Judgment is hereby GRANTED.

FINDINGS OF FACT

Pursuant to 40 C.F.R. §22.17(c) and the entire record in this matter, I make the following findings of fact:

On July 11, 1994, Complainant filed the Complaint in this action with the Regional Hearing Clerk. Complainant attempted to serve the Complaint on Respondent by certified mail with return receipt requested. After the post office returned the Complaint unclaimed, the Complainant served the Complaint on Respondent by personal service on August 20, 1994, at Respondent's home address, 1704 North 18th Drive, Pasco, Washington.

An Answer to the Complaint was therefore due on or about September 9, 1994, within twenty (20) days after service of the Complaint. See 40 C.F.R. § 22.15(a).

As of the date of this Initial Decision, Respondent has not filed an Answer to the Complaint.

Based on the introductory allegations of the Complaint, paragraphs II.2 through II.12:

On October 28, 1993, an investigator from the Washington State Department of Agriculture (WSDA) conducted an inspection at Respondent's facility located at 1704 North 18th Drive, Pasco, Washington. The purpose of the inspection was to determine whether products distributed by Respondent comply with the provisions of FIFRA.

b. The inspector obtained a sample of a product being held for distribution called Flea-Flee for Fifi. The label for this product states, in part, "Gets Rid of Fleas!" and "Another Fine Product by Happy Trails Manufacturing."

c. The sample of Flea-Flee for Fifi was analyzed by the WSDA laboratory in Yakima, Washington. The sample was found to contain 0.4% carbaryl, a known pesticidal active ingredient.

d. Flea-Flee for Fifi is not registered as a pesticide by EPA.

e. The inspector obtained a sample of a product being held for distribution called Flea Scare. The label for this product states, in part, "Rub generously into animals [sic] fur. Pay particular attention to the ears, feet and genital areas where fleas and eggs hide." This label also states, "Another Fine Product by Happy Trails Manufacturing."

f. The sample of Flea Scare was analyzed by the WSDA laboratory in Yakima, Washington. The sample was found to contain 0.7% carbaryl, a known pesticide active ingredient.

g. Flea Scare is not registered as a pesticide by EPA.

h. On December 2, 1993, the investigator conducted an inspection at A & D Brazell Distributing, located at 419 North Oregon Avenue, Pasco, Washington. The purpose of the inspection was to obtain additional samples of the products described above.

i. The investigator obtained a sample of Flea-Flee for Fifi. The sample was analyzed by the WSDA laboratory in Yakima, Washington, and was found to contain 2.01% carbaryl.

j. The investigator obtained a sample of Flea Scare. The sample was analyzed by the WSDA laboratory in Yakima, Washington, and was found to contain 1.59% carbaryl.

k. A & D Brazell Distributing had purchased the Flea-Flee for Fifi and the Flea Scare from Respondent.

5. Based on paragraphs II.13 through II.17 of the Complaint:

a. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines a pesticide as "any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest . . .

."

b. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), states that no one may distribute or sell a pesticide which is not registered under the Act.

c. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), makes it unlawful for any person to sell or distribute a pesticide which is not registered under Section 3 of FIFRA, 7 U.S.C. § 136a.

d. Regulations at 40 C.F.R. Part 152.15 state:

A substance is considered to be intended for a pesticidal purpose, and thus to be a pesticide requiring registration, if:

(a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise):

(1) That the substance (either by itself or in combination with any other substance) can or should be used as a pesticide; or

(2) That the substance consists of or contains an active ingredient and that it can be used to manufacture a pesticide; or

(b) The substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than (1) use for pesticidal purpose (by itself or in combination with any other substance), (2) use for manufacture of a pesticide; or

(c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.

e. Flea-Flee for Fifi and Flea Scare each meet the definition of pesticides requiring registration under the regulations and statutory provisions above because they each contain the active ingredient carbaryl and because their labels claim that the products are intended to be used as pesticides.

6. Based on paragraphs II.18 and II.19 of the Complaint:

a. Respondent distributed the unregistered pesticide Flea-Flee for Fifi, a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

b. Respondent distributed the unregistered pesticide Flea Scare, a violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

7. On July 6, 1995 Complainant filed a Motion for Default Judgment. The Motion was served on the Respondent by regular mail on July 6, 1995. Respondent had twenty days from the date of service to reply, plus five additional days because the Motion was served by mail. As of the date of this Initial Decision and Default Order, Respondent has failed to reply to the Motion.

CONCLUSIONS OF LAW

Pursuant to 40 C.F.R. § 22.17(c), and based on the entire record, I make the following conclusions of law:

The Complaint in this action was served upon Respondent in accordance with 40 C.F.R. §22.05(b)(1).

The Consolidated Rules of Practice Governing The Administrative Assessment of Civil Penalties and the Revocation

or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules") require Respondent to file an Answer to the Complaint within twenty (20) days of the service of the Complaint. 40 C.F.R. § 22.15(a). Respondent has failed to file a timely Answer to the Complaint.

The Consolidated Rules provide that an order of default may be issued "after motion, upon failure to file a timely answer to the complaint Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint" 40 C.F.R. § 22.17(a)(1).

Respondent's failure to file a timely Answer to the Complaint constitutes grounds for issuing an order finding the Respondent in default.

Respondent's default constitutes an admission of all facts alleged in the Complaint, as described in the Findings of Fact above.

Respondent is a "person" as that term is defined in Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

The products, Flea-Flee for Fifi and Flea Scare, are each a pesticide as defined in Section 2(u) of FIFRA, [7 U.S.C. § 136(u)].

8. By reason of the facts found as set out in the Findings of Fact above, the Respondent violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

9. Section 14(a) of FIFRA, 7 U.S.C. § 1361(a), authorizes the assessment of a civil penalty of up to \$5,000 for each violation of FIFRA by a wholesaler, dealer, retailer, or other distributor. The proposed civil penalty in the Complaint is for \$5400.

10. When the Regional Administrator finds that a default has occurred, he or she shall issue a Default Order against the defaulting party, and the default order shall constitute the Initial Decision. 40 C.F.R. §22.17(b). This authority of the Regional Administrator has been delegated to the undersigned Regional Judicial Officer pursuant to 40 C.F.R. §22.04(a)(3).

11. Respondent's failure to file a timely Answer to the Complaint and to the Motion for Default Judgment is grounds for the entry of a Default Order against the Respondent assessing a civil penalty for the violations described above.

DETERMINATION OF CIVIL PENALTY AMOUNT

Under the Consolidated Rules, the amount of the proposed civil penalty "shall be determined in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty and with any civil penalty guidelines issued under the Act." 40 C.F.R. § 22.14(c).

Administrative civil penalties for violations of FIFRA must be assessed and collected pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 1361(a), which provides that in determining the amount of the penalty the Administrator shall consider the appropriateness of the penalty to the size of the business of the person charged, the effect of the penalty on the person's ability

to continue in business, and the gravity of the violation.

The applicable civil penalty guideline is the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) dated July 2, 1990 (referred to below as the enforcement response policy or the policy), which provides guidance as to how to apply the above statutory factors. The enforcement response policy is incorporated herein by reference. Under the policy, the penalty for each violation is computed in a multi-stage process in consideration of the FIFRA Section 14(a) criteria listed above.

First, the gravity of the violation is determined using Appendix A of the policy. The violation of Section 12(a)(1)(A) of FIFRA (sale or distribution of an unregistered pesticide) is categorized as level "2" in Appendix A.

Second, the violator's business is categorized by size, using Table 2 of the policy. Because EPA has been unable to obtain any information regarding the size of the Respondent's business, the Complainant has placed the Respondent's business in category "III," the smallest of three categories for violators subject to Section 14(a)(1) of FIFRA.

Next, the penalty matrix in Table 1 of the policy is used to determine the dollar amount associated with the gravity level of the violation and the size of business category of the violator. This constitutes the base amount for the civil penalty. For each violation here the base civil penalty is \$3000, for a total of \$6000.

Next, further gravity adjustments are made to the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator, using the numerical values in the "Gravity Adjustment Criteria" in Appendix B of the policy. The total numerical value from Appendix B is then used to determine the appropriate upward or downward adjustment to the base penalty under Table 3 of the policy.

In the present case the pesticide involved was categorized at a value of "1," the less toxic of the two possible categories. The actual or potential harm to human health was categorized at "3," the assigned value where the harm to human health is unknown or where there is potential serious or widespread harm to human health. The actual or potential harm to the environment was categorized at "1," the assigned value where there is "minor potential or actual harm to the environment, neither widespread nor substantial." The compliance history of the violator was rated at "0," indicating no prior FIFRA violations. The culpability of the violator was rated at "2," the assigned value where the degree of culpability is unknown or where the violation resulted from negligence. The total of the rated values is "7," which results under Table 3 of the policy in a downward adjustment to the base penalty of ten percent. The base penalty

for each violation was therefore adjusted downward by ten percent, to \$2700, for a total of \$5400.

Finally, the policy requires EPA to consider the effect of the penalty on the violator's ability to continue in business. However, the Respondent has not appeared in this action and has failed to provide EPA with any facts that indicate an inability to continue in business. As stated on page 7 of Complainant's Motion for Default Judgment, the Complainant has attempted to obtain information from the Respondent regarding the Respondent's ability to pay the penalty and the effect of the penalty on the Respondent's ability to stay in business, but has been unsuccessful. The information sought, for example income tax returns, bank statements, and business financial statements, are not available to EPA without the Respondent's cooperation. In the absence of such information, it would be inappropriate to mitigate the penalty amount on this basis. There are no other factors apparent that would warrant a penalty adjustment.

Accordingly, the appropriate civil penalty for each violation is two thousand seven hundred dollars (\$2700), for a total penalty of five thousand four hundred dollars (\$5400).

IV. DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. §22.17, Complainant's Motion for Default Judgment is hereby GRANTED as follows. Respondent is hereby ORDERED to comply with all of the terms of this Default Order:

A. Respondent is hereby assessed a civil penalty in the amount of five thousand four hundred dollars (\$5400) and ordered to pay the civil penalty as directed in this Default Order.

1. Respondent shall pay the civil penalty by certified or cashier's check payable to the Treasurer of the United States within sixty (60) days after a final order issued upon default. The check shall be sent by certified mail, return receipt requested, to:

U.S. Environmental Protection Agency
Region 10
Regional Hearing Clerk
P.O. Box 360903M
Pittsburgh, PA 15251

2. At the time payment is made to the above address, Respondent shall send a copy of the check by first class mail to the following address:

Regional Hearing Clerk
U.S. EPA, Region 10 (Mail Code SO-155)
1200 Sixth Avenue
Seattle, Washington 98101

B. Pursuant to 40 C.F.R. §22.27(c), this Order shall become final within forty-five (45) days after service upon the parties unless it is appealed to the EPA Environmental Appeals Board⁽¹⁾ or

the Environmental Appeals Board elects, sua sponte, to review it.

C. In the event of failure by Respondent to make payment within sixty days after the date this Order becomes final, the matter may be referred to a United States Attorney for recovery by appropriate action in United States District Court pursuant to Section 14(a)(5) of FIFRA, 7 U.S.C. § 1361(a)(5).

D. Pursuant to 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim. Interest will therefore begin to accrue on the civil penalty if it is not paid within sixty (60) calendar days after this Default Order becomes final. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 4 C.F.R. §102.13(c).

E. In addition, a penalty charge of six percent per year will be assessed on any portion of the debt which remains delinquent more than ninety (90) days after payment is due. However, should assessment of the penalty charge on the debt be required, it will be assessed as of the first day payment is due under 4 C.F.R. §102.13(e).

IT IS SO ORDERED.

Date: _____
Steven W. Anderson _____ Region Judicial Officer

1. Under 40 C.F.R. § 22.30, any party may appeal this Order by filing a notice of appeal and an accompanying appellate brief within **twenty days** after this Initial Decision and Order is served upon the parties.