

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 10

IN THE MATTER OF:)	Docket No. 10-94-0192
)	
ENVIRONMENTAL TIMBER)	Proceeding to Assess
COMPANY, INC.,)	Class I Administrative
Kodiak, Alaska)	Penalty Under Clean Water
)	Act Section 309(g),
RESPONDENT)	33 U.S.C. §1319(g)
)	

ORDER DIRECTING ENTRY OF RESPONDENT'S DEFAULT AS TO LIABILITY

This is a proceeding for the assessment of a Class I administrative penalty under Section 309(g) of the Clean Water Act, 33 U.S.C. §1319(g). The proceeding is governed by the Environmental Protection Agency's Proposed 40 C.F.R. Part 28 -- Consolidated Rules of Practice Governing the Administrative Assessment of Class I Civil Penalties Under the Clean Water Act, the Comprehensive Environmental Response, Compensation and Liability Act, and the Emergency Planning and Community Right-to-Know Act, and the Administrative Assessment of Civil Penalties Under Part C of the Safe Drinking Water Act, 56 Fed. Reg. 29,996 (July 1, 1991), issued October 29, 1991 as procedural guidance for Class I administrative penalty proceedings under Section 309(g) of the Clean Water Act, 33 U.S.C. §1319(g), (the "Consolidated Rules").

This Order directs entry of Respondent's liability under Section 28.21(a) of the Consolidated Rules and directs Complainant to submit written argument regarding assessment of an appropriate civil penalty under Section 28.21(b) of the Consolidated Rules.

PROCEDURAL BACKGROUND

The Chief of the Wastewater Management and Enforcement Branch of Region 10 of the United States Environmental Protection Agency (Complainant) initiated this action on January 10, 1995, by issuing to Environmental Timber Company, Inc. (Respondent) an administrative complaint under Section 28.16(a) of the Consolidated Rules. The administrative complaint contained recitations of statutory authority and allegations regarding Respondent's operation of its Kodiak, Alaska, log transfer facility in a manner alleged to be in violation of the Clean Water Act. The administrative complaint provided notice of a proposed penalty in the amount of \$10,000. The letter accompanying the administrative complaint provided notice that failure to respond to the administrative complaint within thirty days would result in the

entry of a default order, and informed the Respondent of its right to a hearing and of the opportunity to seek an extension of the thirty day period for filing a response.

By memorandum dated June 20, 1995, the Regional Counsel for EPA Region 10 designated me as Presiding Officer in this proceeding.

UNTIMELY RESPONSE

Under Section 28.20 of the Consolidated Rules, Respondent had thirty days (unless extended) from its receipt of the administrative complaint to file a response:

(a) Respondent's deadline. The respondent shall file with the Hearing Clerk a response within thirty days after receipt of

(1) The administrative complaint

(b) Extension of respondent's deadline. For the purpose of engaging in informal settlement negotiations between the complainant and respondent the deadline for the respondent to file a response pursuant to paragraph (a)(1) of this section shall be extended:

(1) For any period stipulated by the complainant and respondent (but in no event for longer than ninety days following such deadline), by filing such stipulation with the Hearing Clerk within thirty days after respondent's receipt of the administrative complaint

The initial deadline under Section 28.20(a) for filing a response was February 17, 1995. However, the Respondent and an EPA attorney representing the Complainant executed a stipulation on February 16, 1995 which extended the response deadline for 90 days, the maximum extension allowed under Section 28.20(b)(1). The new deadline for filing a response was therefore May 18, 1995.

No response has been filed to date by the Respondent. Environmental Timber Company, Inc. has therefore failed to respond to the administrative complaint in a timely fashion.

On June 30, 1995, I issued an Order to Show Cause to the Respondent, allowing the Respondent until July 25, 1995 to file a written explanation of the circumstances or reasons surrounding the Respondent's apparent failure to file a timely response. The Respondent did not respond to the Order.

As a consequence of its failure to file a timely response to the administrative complaint, Respondent has waived its opportunity to appear in this action for any purpose. See Section 28.20(e) of the Consolidated Rules. Respondent's failure to file a timely

response to the administrative complaint also automatically triggers the default proceedings provision of the Consolidated Rules. Section 28.21(a) of the Consolidated Rules provides:

Determination of Liability. If the Respondent fails timely to respond pursuant to §28.20(a) or (b) of this Part . . . the Presiding Officer, on his own initiative, shall immediately determine whether the complainant has stated a cause of action.

CAUSE OF ACTION

To state a cause of action against Respondent under Section 309(g) of the Clean Water Act, 33 U.S.C. §1319(g), Complainant must allege that:

- (1) Respondent is a person;
- (2) Respondent discharged a pollutant from a point source to waters of the United States; and
- (3) Respondent did not have a Clean Water Act permit authorizing the discharge.

The Complainant has stated a cause of action in the administrative complaint. In Paragraph II.3 of the administrative complaint Complainant alleged that Respondent is a corporation organized under the laws of the State of Alaska and is a person within the meaning of Section 502(5) of the Clean Water Act, 33 U.S.C. §1362(5). In Paragraph II.4 of the administrative complaint Complainant alleged that Respondent owns and operates a log transfer facility in Kodiak, Alaska, which is a point source within the meaning of Section 502(14) of the Clean Water Act, 33 U.S.C. §1362(14). In Paragraph II.6 of the administrative complaint Complainant alleged that on or about May 27, 1995, Respondent discharged logs from the facility into Kalsin Bay, Kodiak, Alaska, which is a navigable water within the meaning of Section 502(7) of the Clean Water Act, 33 U.S.C. §1362(7), and that logs are a pollutant within the meaning of Section 502(6) of the Clean Water Act, 33 U.S.C. §1362(6). Finally, in Paragraph II.8 of the administrative complaint Complainant alleged that Respondent did not have a permit issued under Section 402 of the Clean Water Act, 33 U.S.C. §1342, authorizing the discharge of pollutants into navigable waters.

The foregoing factual allegations are sufficient to state a cause of action.

ENTRY OF DEFAULT AS TO LIABILITY

Having determined that Complainant has stated a cause of action in the administrative complaint, the Presiding Officer must direct the Regional Hearing Clerk to enter Respondent's default as to liability in the administrative record of this proceeding.

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing ORDER, in the matter of Environmental Timber Co. (10-94-0192), signed by Steven W. Anderson, Presiding Officer, has been filed with the Regional Hearing Clerk, and a copy was served on each of the parties at the address given below by mailing first class as here indicated:

David Smith, Pres.
ENVIRONMENTAL TIMBER CO., INC.
P.O. Box 1639
Kodiak, Alaska 99615

First Class Mail

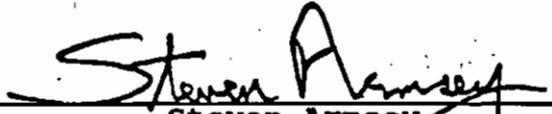
L. Sharry Hammond, Esq. (SO-155)
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, WA 98101

First Class Mail

Mary Shillcutt (SO-155)
Regional Hearing Clerk
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, WA 98101

First Class Mail

Dated at San Francisco, California, this 30th of August, 1995.


Steven Armsey
Regional Hearing Clerk
EPA, Region 9

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.

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.

II. 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:

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

2. 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")

\$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.

III. 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.

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

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 Board¹ 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

¹Under 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.

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing **INITIAL DECISION AND DEFAULT ORDER**, in the matter of **Kelly Marks dba Happy Trails Manufacturing**, [FIFRA]-1094-06-09-012, signed by **Steven W. Anderson**, Presiding Officer, has been filed with the Regional Hearing Clerk, copies being served on each of the parties at the addresses given below by mailing first class as here indicated:

Kelly Marks
Happy Trails Manufacturing
1704 North 18th Drive
Pasco, Washington 99301

First Class Mail

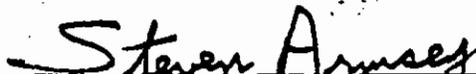
Margaret B. Silver, Esq. (SO-155)
Assistant Regional Counsel
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, WA 98101

First Class Mail

Mary Shillcutt (SO-155)
Regional Hearing Clerk
U.S. EPA, Region 10
1200 Sixth Avenue
Seattle, WA 98101

First Class Mail

Dated at San Francisco, California, this 6th day of Sept, 1995.



Steven Armsey
Regional Hearing Clerk
EPA, Region 9