

12/1

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 DENYING MOTION FOR DEFAULT

This proceeding under Section 14 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (FIFRA) (7 U.S.C. § 1361) was commenced by the filing of a complaint on May 27, 1993, charging Respondent, Hoops Agri-Sales Company (Hoops) with three 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. 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 90 DF 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. No separate penalty was demanded for this alleged violation.<sup>1/</sup> Count III, while alleging erroneously that the application occurred on June 19, 1992, concerned the application, referred to in Count II, of Bladex 90 DF to a corn field operated by Bob and Ed Nesladek. It was alleged that the application was made by Respondent's employee, R. Douglas Hoops, in his capacity as a commercial applicator, but that R. Douglas Hoops was certified only as a private applicator. The complaint further alleged that the application was not made under the direct supervision of a certified commercial applicator. For this alleged violation, it was proposed to assess Hoops a penalty of \$5,000.

---

<sup>1/</sup> This count is somewhat problematic in any event, because the regulation allegedly violated (40 CFR § 171.11(c)(7)) applies to certified commercial applicators and the Hoops were admittedly only certified private applicators.

In a letter-answer, dated June 17, 1993, signed by Robert A. Hoops, Hoops disputed certain facts alleged in the complaint and contested the amount of the penalty as excessive. Mr. Hoops stated that it was his understanding that as long as the information, i.e., customer license number and date of expiration, was available, it was unnecessary that this information be on the invoice or sales ticket. He alleged that this information was kept in a notebook, which had been misplaced on the day of the inspection. Regarding Count III, Mr. Hoops pointed out that the date of the application as alleged in the complaint (June 19, 1992) was erroneous and that he was under the impression that a private applicator could apply RUPs for others. He thought that the only reason for a commercial applicator's license was to supervise individuals who were not certified in the application of RUPs. Mr. Hoops stated that he and his employee, R. Douglas Hoops, had become commercially certified since receipt of the complaint.

The ALJ directed the parties to exchange pre-hearing information on or before January 28, 1994 (letter, dated November 10, 1993). Complainant was directed, inter alia, to explain the basis for the apparent contention that information as to product registration, customer certification, expiration date, etc., must appear on the invoice or sales ticket rather than being maintained in other records of vendor. Respondent Hoops was directed to furnish a copy of the notebook used to record sales of

restricted use pesticides and their registration numbers, customer certification numbers and dates of expiration, if the notebook had been located. Additionally, if Hoops was contending that the proposed penalty would adversely affect its ability to continue in business, Hoops was ordered to furnish financial statements, copies of income tax returns or other evidence to support such contention.

In a letter to the ALJ, dated January 6, 1994 (copy to Hoops), counsel for Complainant stated that the parties had discussed settlement and that Respondent had agreed to supply financial information relating to modification of the size of business category [for penalty calculation purposes] and other information relevant to certain allegations in the complaint. Counsel stated that at least six requests to Respondent had been made for the information [to no avail]. In closing, the letter stated "we are aware that pre-hearing information is due January 28, 1994."

Complainant served its pre-hearing information under date of January 26, 1994, which included the report of inspection of Hoops conducted on January 25, 1993, copies of labels of the RUPs identified in the complaint, affidavits of Robert A. Hoops and R. Douglas Hoops, invoices and sales records for the RUPs in question and an explanation for the proposed penalty calculation.

Complainant explained that it was not contending that the information required by the regulation must appear on the sales invoices, but that the required information did not appear in any records made available at the time of the inspection.<sup>2/</sup> Hoops did not submit a pre-hearing exchange.

---

<sup>2/</sup> Record keeping is required when making restricted use pesticides available to:

(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:

(A) Name and address of the residence or principal place of business of each person to whom the pesticide was made available for use.

(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.

(D) The quantity of the pesticide made available for use in the transaction.

(E) The date of the transaction. 40 CFR § 171.11(g)(2).

Noting Hoops' failure to file a pre-hearing exchange, Complainant filed a motion for a default order on March 1, 1994.<sup>3/</sup> Hoops has not responded to the motion.

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

In accordance with Rule 22.17 of the Consolidated Rules of Practice, 40 CFR Part 22 (supra note 3), a party may be found in default ". . . (2) after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer . . . ." The ALJ's letter, dated November 10, 1993, directing that the parties exchange specified information on or before January 28, 1994, is a pre-hearing order. Complainant has complied with the mentioned order, while Hoops has made no response of any kind to the order.

The information Hoops was directed to supply, i.e., if located, a copy of the notebook allegedly used to record information required by the regulation (supra note 2), such as customer name, certification number, expiration date, is obviously relevant to Count I of the complaint. Indeed, the notebook, if produced, would constitute a complete defense to the mentioned count. Moreover, the financial information Hoops was directed to

---

<sup>3/</sup> Default: A party may be found to be in default. . . after a motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer . . . . Default by respondent constitutes, for the 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. 40 CFR § 22.17(a).

supply is relevant for penalty calculation purposes. Nevertheless, the law favors resolution of cases on their merits, and default, being a drastic remedy, will not necessarily be granted merely because a party may technically be in default. See, e.g., Ignatios Hadjiloukas, d/b/a Tradig Company, Docket No. I.F. & R.-III-358-C (Order Denying Complainant's Motion for Default, April 12, 1991). Like Hoops herein, Hadjiloukas appeared pro se. Unlike Hoops, however, Hadjiloukas responded to the motion for default, alleging that under the circumstances, which included a prior suspension of proceedings and prolonged periods of inaction, he was under the impression he would be notified when further steps were required. These circumstances led readily to a finding of good faith sufficient to deny the motion for default.

While Hadjiloukas is readily distinguishable from the present situation, Hoops may well have a complete defense to Count I, a good faith defense to Count III and a defense to the magnitude of any penalty based on the sales category into which it should be placed for penalty calculation purposes. Hoops will be given another opportunity to comply with the requirement for a pre-hearing exchange.

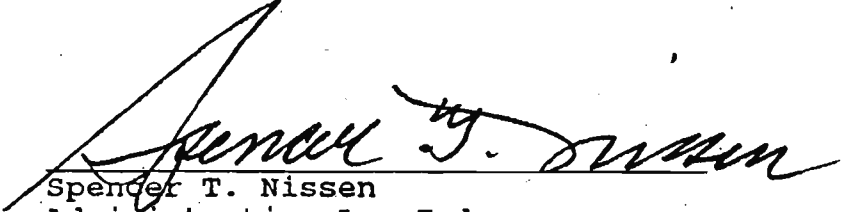
#### O R D E R

On or before December 29, 1994, Hoops is directed to furnish the information specified in my letter, dated November 10, 1993, i.e., a copy of the notebook used to record information as to customer certification numbers, expiration dates, etc., for

purchasers of RUPs and data, such as financial statements or copies of income tax returns. If the notebook has not been located, describe in detail efforts made in that respect and probable or possible reasons for its disappearance.

If Hoops fails to comply with this order, Complainant is invited to renew its motion for default.

Dated this 1st day of December 1994.

  
Spender T. Nissen  
Administrative Law Judge



CERTIFICATE OF SERVICE

This is to certify that the original of this ORDER DENYING MOTION FOR DEFAULT, dated December 1, 1994, in re: Hoops Agri-Sales Company, Dkt. No. IF&R-VII-1233C-93P, was mailed to the Regional Hearing Clerk, Reg. VII, and a copy was mailed to Respondent and Complainant (see list of addressees).

*Helen F. Handon*

Helen F. Handon  
Legal Staff Assistant

DATE: December 1, 1994

ADDRESSEES:

Mr. Robert A. Hoops  
Hoops Agri-Sales Company  
P.O. Box 420  
North Bend, NE 68649

Henry F. Rompage,  
Associate Regional Counsel  
U.S. EPA, Region VII  
726 Minnesota Avenue  
Kansas City, KS 66101

Ms. Venessa R. Cobbs  
Regional Hearing Clerk  
U.S. EPA, Region VII  
726 Minnesota Avenue  
Kansas City, KS 66101