

4/18/96

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

In the Matter of )  
 )  
Scotts-Sierra Crop ) Docket No. FIFRA-09-0864-C-95-03  
Protection Company )  
 )  
Respondent )

ORDER DISMISSING COMPLAINT WITHOUT PREJUDICE

The Region 9 office of the United States Environmental Protection Agency (the "Complainant" or "Region") commenced this proceeding by filing a Complaint on January 26, 1996 against Scotts-Sierra Crop Protection Company (the "Respondent"), a corporation headquartered in Marysville, Ohio. The Complaint charged Respondent with 157 counts of violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") in connection with sales of pesticide products from Respondent's facility located in Milpitas, California.

On February 6, 1996, before Respondent filed its Answer, Complainant filed a First Amended Complaint pursuant to the EPA Rules of Practice, 40 C.F.R. §22.14(d), that corrected two minor omissions in the original Complaint. The Complaint charges Respondent with 157 violations of FIFRA §12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A), selling an unregistered pesticide, and FIFRA §12(a)(2)(K), violating a pesticide cancellation order. The Complaint seeks a total civil penalty of \$785,000 on the basis of \$5000 for each alleged violation, the maximum authorized pursuant to FIFRA §14(a)(1), 7 U.S.C. §136l(a)(1).

The Respondent filed its Answer on March 4, 1996. On the same date, Respondent filed a Motion for Judgment on the Pleadings. Complainant filed its Response to Respondent's Motion for Judgment on the Pleadings on April 5, 1996.

Discussion

A motion such as this for "judgment on the pleadings" is not specifically authorized by the EPA Rules of Practice. The instant motion may, however, be considered a motion for accelerated decision under 40 C.F.R. §22.20(a). That provision states that "the Presiding Officer, upon motion of the respondent, may at any time dismiss an action without further hearing . . . on the basis of failure to establish a prima facie case or other grounds which show no right to relief on the part of the complainant."

The Complaint charges Respondent with 157 sales of three products containing the active ingredient ethylene bisdithiocarbamates ("EBDCs") after a cancellation order was issued by the Agency, rendering those sales of an unregistered pesticide. The Respondent's motion is based on three allegations in the Complaint that state, with respect to each of those three products, as follows:

"At all times pertinent to this First Amended Complaint the product known as [DUOSAN WSB; DUOSAN; ZYBAN] was registered by the EPA to the Respondent."  
(First Amended Complaint, ¶¶9,78,184, emphasis added).

Respondent admits those allegations in its Answer. In its motion, Respondent quite logically points out that if the products were registered at all times pertinent to the Complaint, their sales on the dates alleged in the Complaint could not constitute sales of an unregistered or cancelled pesticide in violation of FIFRA §§12(a)(1)(A) and 12(a)(2)(K).

In its response to the motion, Complainant focuses on the past tense of the word "was" in the three paragraphs, contending that usage was intended primarily to indicate that Respondent registered the pesticides before the Notice of Cancellation. No amount of Complainant's semantic gyrations, however, can alter the plain meaning of the language in those allegations. The verb "was" relates to the phrase "[a]t all times pertinent to this First Amended Complaint," not to the period prior to EPA's Notice of Cancellation of the EBDC-containing pesticides. In the response, Complainant does state its theory of the case -- that the registrations were cancelled by operation of law as set forth in the Notice of Cancellation.

If, in fact, Complainant wishes to allege that the registrations were cancelled by the Notice, and that Respondent's subsequent sales were of unregistered, cancelled pesticide products, that must be clearly stated in the Complaint, the foundation of the proceeding, not in the response to Respondent's motion. The Respondent here has actually admitted the basic factual allegations of the Complaint that, for each of the 157 sales, the product was sold without modifying the label as required by the Notice of Cancellation. However the Complaint as drawn contains an internal contradiction that goes to the heart of the allegations -- the registration of the pesticide products. In an action for selling unregistered pesticides, the Complaint states that at all pertinent times, the pesticide products were registered.

In these circumstances, the Complaint should be dismissed without prejudice, granting leave to Complainant to file a Second Amended Complaint. The instant motion is analagous to one under the Federal Rules of Civil Procedure ("FRCP"), Rule 12(b)(6), which

provides for dismissal of a complaint for "failure to state a claim upon which relief may be granted." The case law under that Rule generally holds that leave to amend a dismissed complaint shall be freely given.

The problem here could be rectified by more careful drafting of the Complaint. In a similar situation, the Eleventh Circuit Court of Appeals has stated that:

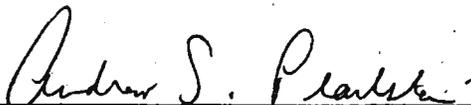
"Where a more carefully drafted complaint might state a claim, a plaintiff must be given at least one chance to amend the complaint before the district court dismisses the action with prejudice." Bank v. Pitt, 928 F.2d 1108, 1112 (11th Cir., 1991).

This policy is also codified in the F.R.C.P. Rule 15(a) states that leave to amend a complaint "shall be freely given when justice so requires." The Environmental Appeals Board has held that the policy of rule 15(a) should apply to EPA practice. In the Matter of Asbestos Specialists, Inc., 4 EAD 819,830 (EAB, October 6, 1993). This practice fosters the objective of the Agency's rules to get to the merits of the controversy. Dismissal of a complaint with prejudice should be reserved for those rare occasions when the complainant is acting in bad faith; a more carefully drafted complaint would still be unable to state a claim for relief; or the respondent would be unduly prejudiced. See Asbestos Specialists, above, at 828,830.

In this case there is no showing of bad faith by Complainant or prejudice to Respondent if the Complaint were amended. A more carefully drafted complaint might state a claim for relief for the violations of FIFRA alleged in this proceeding. Therefore, the First Amended Complaint is dismissed without prejudice, and Complainant is granted leave to file a Second Amended Complaint.

#### Order

The First Amended Complaint is dismissed. Complainant will have until 20 days after service of this Order to file a Second Amended Complaint, under the same docket number. Pursuant to 40 C.F.R. §22.14(d), Respondent will have an additional 20 days from the date of service of the Second Amended Complaint to file an Amended Answer.

  
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Andrew S. Pearlstein  
Administrative Law Judge

Dated: April 18, 1996  
Washington, D.C.

In the Matter of Scotts-Sierra Crop Protection Company  
Docket No. FIFRA-09-0864-C-95-03

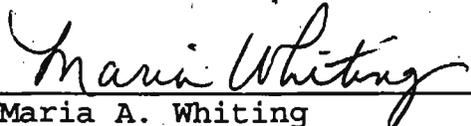
**CERTIFICATE OF SERVICE**

I certify that the foregoing Order Dismissing Complaint Without Prejudice, dated April 18, 1996, was sent by regular mail to the addressees listed below.

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Dated: April 18, 1996  
Washington, D.C.