

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Office of Administrative Law Judges
Washington, D. C.

05 AUG 15 AM 11: 23

ENVIRONMENTAL PROTECTION
AGENCY-REGION VII
REGIONAL HEARING CLERK

In the Matter of)
)
Yates Center Elevator, Inc.) Docket No. FIFRA-07-2005-0235
)
)
)
Respondent)

ORDER

The purpose of this Order is to direct the parties to exchange prehearing information in accordance with Rule 22.19 of the Consolidated Rules of Practice Governing the Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

The parties are directed to provide the following information:

By Complainant and Respondent

1. Desired or required location for the hearing. See Rules 22.19(d) and 22.21(d).
2. A list of expected witnesses, a summary of their anticipated testimony, and a copy of each document or exhibit to be introduced into evidence at the hearing to the extent not covered by specific requests below.

By Complainant

1. Provide a copy of report of inspection, request for information, Respondent's reply thereto, and any other documents which support the violations alleged in the complaint.
2. Provide a copy of the labels of each pesticide identified in the complaint and a copy of each invoice referred to Counts 1 through 6 of the complaint.
3. State the factual basis for the allegations in Count 1 that at the time of the sale of GRAZON P+ D referred to therein, Mr. David Jones, the purchaser, was not a certified applicator nor was he working under the supervision of a certified applicator at the time he applied the pesticide. Provide a copy of the statement obtained from Mr. Jones referred to in paragraph 25 of the complaint.
4. State the factual basis for the allegations in Count 2 that at the time of the sale of GRAZON P+D referred to therein, Mr. Marvin Eagle, the purchaser, was not a certified

applicator, nor was he a certified applicator or working under the supervision of a certified applicator at the time he applied the pesticide. Provide a copy of the statement obtained from Mr. Eagle referred to in paragraph 33 of the complaint.

5. State the factual basis for the allegations in Count 3 that at the time of the sale of Grazon P+D referred to therein, neither Mr. Darwin Deets, the purchaser, nor Jerry Shaffer, the person who picked up the pesticide, were certified applicators nor were they working under the supervision of a certified applicator when Mr. Deets applied the pesticide. Provide a copy of the statement obtained from Mr. Deets referred to in paragraph 41 of the complaint. Respond to Respondent's assertion that at the time of the mentioned application, Respondent's employee, Mr. Tom Davis, a certified applicator, was available as a supervisor.

6. State the factual basis for the allegations in Count 4 that at the time of the sale of GRAZON P+D referred to therein, Mr. Darwin Deets, the purchaser, was not a certified applicator nor was he working under the supervision of a certified applicator when he applied the pesticide. Provide a copy of the statement obtained from Mr. Deets referred to in paragraph 49 of the complaint.

7. State the factual basis for the allegations in Count 5 that the sale of 1.5 gallons of GRAZON P+D in a 2.5 gallon container to Mr. Darwin Deets on May 15, 2003, was not encompassed within the terms of the product's registration and that therefore, this constituted the sale of an unregistered and adulterated pesticide.

8. State the factual basis for the allegations in Count 6 that the sale to Mr. Marvin Eagle on May 15, 2003 of 0.5 gallons of the pesticide, REMEDY, in an opened, partially filled container was not a product encompassed within the terms of the product's registration and that therefore, this constituted the sale of an unregistered and adulterated pesticide..

9 State the factual basis for the allegations in Count 7 that at the time of an inspection on January 28, 2004, Respondent was holding for distribution or sale individual packets of PATRIOT DEFENSE SYSTEM CATTLE EAR TAGS, which had been removed from the end-user carton, and that this activity constituted the distribution or sale of an unregistered pesticide. Respond to Respondent's assertion that the product was received and placed for sale as furnished by the wholesaler and that Respondent had no knowledge of any rule [registration] violation.

10. Explain the basis for the contention that the holding for distribution or sale of PATRIOT DEFENSE SYSTEM CATTLE EAR TAGS as alleged in Count 7 is also the sale or distribution of a misbranded pesticide for which a separate penalty may be assessed as alleged in Count 8. Inasmuch as the unit of violation in FIFRA § 12(a)(1) is the "distribution or sale" of an "unregistered pesticide" (§ 12(a)(1)(A)) or of any pesticide which is "adulterated or misbranded" (§ 12(a)(1)(E)), explain the basis for the position that a single distribution or sale may be broken into separate components for the purpose of determining offenses under FIFRA § 14(a). See also the discussion on Independently Assessable Charges at 25-26 of the FIFRA Enforcement Response Policy ("ERP"), July 2, 1990.

11. State the factual basis for the allegations in Count 9 that at the time of an inspection on January 28, 2004, the Directions for Use label pamphlet was missing from the back of a one quart container of PROZAP INSECTRIN X, which was being held for sale. Respond to Respondent's assertion that he had no knowledge the pamphlet was missing from one of many bottles on the shelf.

12. State the factual basis for the allegations in Count 10 of the complaint that at the time of an inspection on January 28, 2004, an open container of GLEAN FERTILIZER COMPATIBLE HERBICIDE was being held for distribution or sale; that approximately one-half of the labeled contents were in the container.; and that this constituted the distribution or sale of an unregistered, adulterated pesticide.

13. Justify the Gravity Adjustment Values used in the penalty calculations with particular emphasis on the values for "human harm", compliance history and culpability.

14. State the consideration, if any, given to the appropriateness of the penalty to the size of Respondent's business and the effect of the penalty on Respondent's ability to continue in business and provide any documents upon which such consideration, if rendered, was based.

By Respondent

1. State the approximate date, if known, of Mr. David Jones' certificate as a certified applicator and provide a copy of any invoices which contain or refer to Mr. Jones' Certificate No. and date.

2. Describe the location of the field or other area where the application of GRAZON P+D alleged in Count 3 was made and any circumstances which would support the assertion that Mr. Tom Davis, an employee of Respondent and a certified applicator, was available to supervise the application.

3. Identify the wholesaler and the date or dates the PATRIOT SYSTEM INSECTICIDE CATTLE EAR TAGS, referred to in Counts 7 and 8, were delivered to Respondent and describe the general location where these tags were held for sale in Respondent's retail establishment at the time of the inspection on January 28, 2004.

4. Describe the location in Respondent's retail establishment of the shelf where the bottles of PROZAP INSECTRIN X, referred to in Count 9 of the complaint, were being held for sale and the approximate number of bottles on the shelf at the time the inspection on January 28, 2004.

5. Describe the location of the container of GLEAN FERTILIZER COMPATIBLE HERBIDIDE, referred to in Count 10 of the complaint, at the time of the inspection on January 28, 2004, and state any circumstances which would support the allegation that this product was not held for sale.

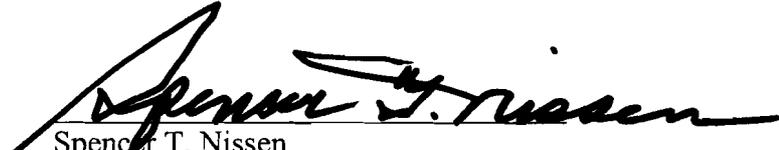
6. If Respondent contends that the proposed penalty would adversely effect its "ability

continue in business”, provide financial statements, copies of income tax returns, or other data to support such a contention.

Responses to this Order shall be provided to the Regional Hearing Clerk, the other party, and the undersigned on or before September 9, 2005.

Upon receipt of and review of the responses, I will be in contact with the parties for the purpose of scheduling this matter for hearing.

Dated this 12th day of August, 2005.


Spencer T. Nissen
Administrative Law Judge

*In accordance with Rule 22.5(c)(4), the parties are directed to promptly notify the Regional Hearing Clerk, the other party and the ALJ of any change in address and/or telephone number.

**The parties are informed that the use of E-Mail to communicate with this office is considered to be inappropriate.

CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of this Order, dated August 12, 2005, *In the Matter of Yates Elevator, Inc.*, Docket No. FIFRA-07-2005-0235, were mailed to the Regional Hearing Clerk, Region III, and a copy was mailed, certified mail, return receipt requested, to addressees.



Nelida Torres
Legal Staff Assistant

Date: August 12, 2005

Kathy Robinson
Regional Hearing Clerk
U.S. EPA-Region VII
901 North 5th Street
Kansas City, KS 66101

Chris R. Dudding, Esq.
Assistant Regional Counsel
U.S. EPA-Region VII
901 North 5th Street
Kansas City, KS 66101

John T. Davis
Yates Center Elevator, Inc.
109 N. Pratt
Yates Center, KS 66783