

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)	
)	Docket Nos.
RICHARD ROGNESS and)	IF&R VII-1088C-91P
PRESTO-X COMPANY,)	IF&R VII-1075C-91P
)	
Respondents)	

ORDER GRANTING PARTIAL ACCELERATED DECISION

During the on-the-record conference call in this matter on March 16, 1995, the Presiding Judge granted a partial accelerated decision in favor of the Complainant, finding that Respondents had violated the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. This Order, among other things, memorializes the oral ruling on accelerated decision made during the conference call. Therefore, the Presiding Judge hereby confirms that a partial accelerated decision has been granted and that Respondents have violated FIFRA.

The following Findings of Fact and Conclusions of Law are adopted by the Presiding Judge on the issue of liability:

1. Respondent Richard Rogness is a person under Section 2(s) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136.

2. Respondent Presto-X Company is a person under Section 2(s) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136.

3. Degesch Phostoxin, which bears EPA Registration No. 40285-2, is a pesticide under Section 2(u) of FIFRA, 7 U.S.C. § 136(u). Respondent's Motion for Dismissal, p. 3 and Exhibit 3;

Complainant's Prehearing Exchange, Exhibit 1, p. 1 and Attachment 4.

4. In pertinent part, the label for Degesch Phostoxin contains the following statement: "Metals such as copper, brass and other copper alloys, and precious metals such as gold and silver are susceptible to corrosion by phosphine. Thus, small electric motors, smoke detectors...communication devices, computers, calculators and other electrical equipment should be protected or removed before fumigation." Respondent's Motion for Dismissal, Exhibit 3, p. 3; Complainant's Prehearing Exchange, Exhibit 1, Attachment 4.

5. The phrase "should be protected or removed" obligated any person applying Degesch Phostoxin to protect or remove the electrical equipment referred to in Paragraph 4 before use of the pesticide. See, for example, Webster's New World Dictionary 372 (3d College Edition 1988), which states that "should" is "used to express obligation, duty, propriety, or desirability." See also Black's Law Dictionary 1237 (5th ed. 1979), where "should" is described as "ordinarily implying duty or obligation".¹

6. At all times relevant to this matter, Respondent Rogness was an employee of Respondent Presto-X. Respondent's

¹The principle of statutory construction that "(a) statutory provision would generally be regarded as mandatory where the power or duty to which it relates is for the public benefit, good, interest or protection..." suggests that similar language in a statute might also be construed as mandatory. Sutherland Stat. Const. § 57.02 (5th ed. 1992).

Motion for Dismissal, p. 2; Complainant's Prehearing Exchange, Exhibit 1, p. 1 and Exhibit 5.

7. On or about August 31, 1989, Respondents Presto-X and Rogness fumigated a moving van by applying Degesch Phostoxin. Respondent's Motion for Dismissal, p. 2; Complainant's Prehearing Exchange, Exhibit 1, pp. 1-2; Exhibit 2, p. 1; Exhibit 5; and Exhibit 6.

8. The moving van referred to in Paragraph 6 contained several items of electrical equipment. Complainant's Prehearing Exchange, Exhibit 1, p. 1; Exhibit 2, p. 1-2.

9. Respondents Presto-X and Rogness fumigated the entire contents of the moving van referred to in Paragraph 6 and did not protect or remove the electrical equipment referred to in Paragraph 7 prior to fumigation. Complainant's Prehearing Exchange, Exhibit 1, p. 1; Exhibit 2, p. 1.

10. Under Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), it is unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

11. Under Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), "to use any registered pesticide in a manner inconsistent with its labeling" means to use any registered pesticide in a manner not permitted by the labeling, with certain specified exceptions not applicable to this matter.

12. Failing to remove or protect electrical appliances prior to fumigation with Degesch Phostoxin constitutes using this pesticide in a manner not permitted by the labeling and therefore

constitutes using this pesticide in a manner inconsistent with its labeling.

13. Respondents Presto-X and Rogness violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G) by using Degesch Phostoxin in a manner inconsistent with its labeling.

Penalty

The remaining issue in this matter is the appropriate penalty for Respondents' violations of FIFRA and the method by which this penalty should be determined. Specifically, the parties are directed to confer on the issue of whether an evidentiary hearing is necessary to determine the penalty in this matter, or whether a penalty can be determined based on the written record to date, together with such additional written evidence and arguments the parties might deem relevant. The parties are hereby directed to file with the Presiding Judge statements regarding the results of these discussions by June 16, 1995.

If either party requests an evidentiary hearing on the issue of penalty, then the issue of penalty will be determined after such a hearing at a time and place to be established by a future order. If, however, the parties agree that the penalty can be determined based on the written record, the parties are directed to file by June 30, 1995, a designation of those portions of the record in this matter that are relevant to the issue of penalty, together with such additional evidence and argument as may assist the Presiding Judge in setting a penalty for Respondent's

violations. Any such arguments shall, among other issues, specifically address the issue of the appropriateness of separate penalties for the two violations of FIFRA committed by the two Respondents in this matter.

Letter Pleadings

Finally, the parties should note that letters to the Presiding Judge such as those submitted on April 20 and April 26, 1995 are not contemplated by the Rules of Practice, 40 C.F.R. Part 22. Therefore, such letter pleadings are not favored and the parties should submit argument to the Presiding Judge in accordance with the requirements of Section 22.16 of the Rules (regarding Motions).

SO ORDERED.

S
Daniel M. Head
Administrative Law Judge

Dated:

5-11-95
Washington, D.C.