

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

81 OCT 30 P 3: 41

IN THE MATTER OF:)
) I.F.&R. Docket No. VII-383C-81P
) -----
Exterminators of Fort Dodge, Inc.) Marvin E. Jones
Cancelled 11/21/80) Administrative Law Judge
aka Guaranteed Extermination of) 324 East 11th Street
Fort Dodge, Inc.) Kansas City, Missouri 64106
Box 1624)
19 North 21st Street)
Fort Dodge, Iowa 50501)

INITIAL DECISION RENDERED ON SECOND MOTION FOR ACCELERATED DECISION

On August 6, 1981 an Accelerated Decision was issued by the undersigned finding and holding that Respondent's subject product was sold by it on August 13, 1979 and was misbranded (7 USC 136j(a)(1)(E), and that said sale was in violation of Section 12(a)(1)(A), 136j(a)(1)(A), for the reason that said sale was of a pesticide not registered as required under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA); and that Respondent was subject to the assessment of a penalty for each violation. Said Decision did not assess a civil penalty for the reason that Complainant did not make out a prima facie case as the appropriate amount of said penalty and this case was set for hearing on October 7, 1981 in Fort Dodge, Iowa.

On September 16, 1981, Complainant filed its Motion for Accelerated Decision, accompanied by affidavits showing prima facie that subject product so sold was not registered and that an appropriate civil penalty is that provided under 39 FR 27711 for a Category I Respondent, and in the amount proposed by the subject Complaint of \$1720.00.

The authority of the undersigned to render an initial decision as to all or any part of this proceeding is provided by 40 CFR 22.20(a), of the regulations governing this proceeding. Section 22.16(b) provides that Respondent's response to the instant motion must be filed within ten (10) days after service (and shall be accompanied by any affidavit, certificate, other evidence or legal memorandum relied upon). Said subsection further authorizes the shortening or enlargement of said time for Respondent's said response.

By my order of September 21, 1981 I continued for an indefinite time the adjudicatory hearing then set for October 7, 1981; and ordered that Respondent file its response to Complainant's Motion for Accelerated Decision on or before October 13, 1981; and that copies of said order be forwarded by

certified mail to Mr. James Hetland, President of Respondent; to Mr. Alvin J. Ford, attorney in Sioux City, Iowa, who then represented Respondent and said James Hetland in a bankruptcy proceeding in the Northern District of Iowa, Central Division.

Mr. Ford responded on September 28, 1981 by advising, by letter to Complainant that he had withdrawn as Respondent's attorney. No response has been received from Mr. Hetland. Under 40 CFR Section 22.20(a) the issuance of an accelerated decision is now authorized to be issued, as the allegations of said motion and its accompanying affidavits have been by the Respondent admitted. On the basis of Complainant's motion and the said affidavits filed herein by Complainant, I make the following.

FINDINGS OF FACT

1. As found by my Accelerated Decision, issued August 6, 1981, Respondent's product FLY SPRAY FOR MACHINES was, when sold to Happy Chef, Cherokee, Iowa on August 13, 1979, not registered under Section 3 of the Act in violation of Section 12(a)(1)(A), 7 USC 136j(a)(1)(A). On the basis of the record herein, I further find that said product was "misbranded" in violation of 7 USC 136j(a)(1)(E).

2. Respondent Exterminators of Fort Dodge, also known as Guaranteed Extermination of Fort Dodge (Iowa) does not and never has had a pesticide product containing Resmethrin registered with the Administrator of United States Environmental Protection Agency under Section 3 of the Act (FIFRA). Further there are no pending applications made by Respondent for registration under Section 3 of FIFRA (of a product containing Resmethrin.) (See Affidavit of Franklin D.R. Gee filed with Complainant's said motion.)

3. For purposes of determining an appropriate civil penalty to be assessed herein, Respondent was properly placed in Category I as its gross sales for the calendar year 1979 were less than \$100,000.00. (See Guidelines for Assessment of Civil Penalties 39 FR 27713 et seq., and see Affidavit of Judith M. Sturgess filed with said motion.)

4. Respondent is licensed as a pesticide applicator and, as such, has knowledge of the Act and pesticide regulations. The penalty was thus calculated by affiant Sturgess using said Guidelines section "Non-Registered, Knowledge/No Application Submitted" to indicate the level of gravity to be considered with reference to the subject violation.

5. Subject product failed to bear a product registration number, names and address of producer, the net weight of contents, as well as "directions for use" and "precautionary statements." (Sturgess affidavit.)

On consideration of Complainant's said motion, affidavits attached thereto and the Findings of Fact hereinabove set forth I make the following.

CONCLUSIONS OF LAW

1. Respondent violated Section (a) (1) (A) of the Act by selling on August 13, 1979 subject pesticide which was not registered under Section 3 of the Act.
2. Respondent said product so sold was misbranded in violation of Section 12(a) (1) (E) of the Act.
3. An appropriate civil penalty to be assessed for the said violation, herein established is the sum of \$1720.00

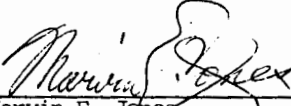
PROPOSED FINAL ORDER

Having considered the entire record and based on the Findings of Fact and Conclusions of Law herein it is proposed that the following Order be issued:

FINAL ORDER¹

Pursuant to Section 14(a) (1) of the Act, a civil penalty of \$1720.00 is assessed against Respondent EXTERMINATORS OF FORT DODGE, INC. aka Guaranteed Extermination of Fort Dodge, Inc. for violations of said Act which have been established, by the record on the basis of the Complaint issued on March 23, 1981, and Respondent is ordered to pay the same by cashier's or certified check, forwarded to the Regional Hearing Clerk and payable to the Treasurer, United States of America, within sixty (60) days of the receipt of this order.

This Initial Decision signed and filed this 26th day of October, 1981 at Kansas City, Missouri.


 Marvin E. Jones
 Administrative Law Judge

¹ The Initial Decision and the proposed Final Order assessing a civil penalty shall become the final order of the Administrator unless appealed or reviewed as provided in 40 CFR 22.27(c).

CERTIFICATE OF SERVICE

I certify that the original of this Initial Decision was mailed to the Hearing Clerk, Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by certified mail, return receipt requested; and true and correct copies sent to the following on this 26th day of October 1981.

Mr. James Hetland
President
Exterminators of Fort Dodge
Rural Route 5
Fort Dodge, Iowa 50501

Certified Mail
Return Receipt Requested

Mr. Thomas E. Bischof
Enforcement Division
Environmental Protection Agency
324 East 11th Street
Kansas City, Missouri 64106

Hand-carried

Regional Hearing Clerk, Region VII
Environmental Protection Agency
324 East 11th Street
Kansas City, Missouri 64106

Hand-carried

Rita Reicks