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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
DAVID L. REDLER D/B/A TREE N') IF&R Docket No. VII-1185C-93P
TURF LAWNSCAPES,)
)
Respondent)

ORDER ON DEFAULT

On March 4, 1993, an Order Setting Prehearing Procedures was issued herein requiring that the parties file their prehearing exchanges by May 5, 1993. This prehearing exchange date was twice extended by agreement of the parties, first until June 7, 1993 and finally until July 7, 1993. Complainant filed its prehearing exchange on July 7, 1993, but the Respondent has not to date submitted the required prehearing exchange.

On July 14, 1993, Complainant filed a Motion for Default because of the Respondent's failure to file a prehearing exchange as directed in the Order Setting Prehearing Procedures. The Respondent did not submit any opposition to the Motion for Default. As a result, the Presiding Judge, on July 18, 1994, issued an Order to Show Cause directing the Respondent to show, on or before August 15, 1994, why he did not comply with the prehearing exchange requirement and why the Motion for Default should not be granted. However, the Order to Show Cause had to be reissued on August 3, 1994 because it was served on Respondent's former counsel. The certified mail copy of the Reissued Order to Show Cause was returned with a post office notation of "refused". The Order to Show Cause was reissued three more times, on August 31, 1994, on

May 26, 1995 and on October 30, 1995. In each reissuance, service was unable to be perfected. Further, in the final reissuance of the Order to Show Cause, it was noted that the Respondent has failed to furnish a change of address. Moreover, the final reissuance of the Order to Show Cause set out that, if the order is returned because of address difficulties, the Respondent will be considered to have waived his right to notice and service of the order, as provided for in Section 22.05(c)(4) of the EPA Rules of Practice, 40 C.F.R. § 22.05(c)(4), and will be subject to a default order.

Under Section 22.17(a) of the EPA Rules of Practice (Rules), 40 C.F.R. § 22.17(a), a party may be found in default upon failure to comply with a prehearing order of the Presiding Judge. By not filing a prehearing exchange, Respondent has failed to comply with the March 4, 1993 Order Setting Prehearing Procedures. Therefore, the issuance of this Order on Default is warranted, and the Complainant's Motion for Default Order is hereby granted. This Order on Default is being served by certified mail, return receipt requested, and by regular mail on the Respondent at his last known address.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The findings of fact and conclusions of law filed by Complainant with its Motion for Default are adopted and incorporated herein by reference. They are appended hereto as Attachment A, including the June 17, 1993 proposed penalty calculation.

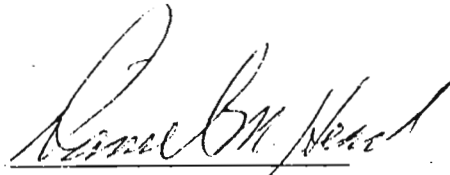
ORDER

Since it has been determined that Respondent is liable for the violations alleged in the Complaint, a penalty of \$1,000 is assessed against Respondent for violation of Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §

136j(a)(2)(G).¹ The penalty shall be paid within sixty (60) days of receipt of this Order, by submission of a cashier's or certified check in the amount of \$1,000 payable to the Treasurer of the United States, to:

EPA-Region VII
Regional Hearing Clerk
U. S. Environmental Protection Agency
P.O. Box 36074M
Pittsburgh, PA 15251

SO ORDERED.



Daniel M. Head
Administrative Law Judge

Dated: February 7, 1996

Washington, D.C.

¹ This Order constitutes an initial decision and, unless appealed in accordance with Section 22.30 of the Rules or unless the Environmental Appeals Board (EAB) elects to review this Order sua sponte, it will become the final order of the EAB in accordance with Section 22.27© of the Rules.

IN THE MATTER OF DAVID L. REDLER d/b/a TREE N' TURF LAWNSCAPES.
 Respondent
 IF&R Docket No. VII-1185C-93P

CERTIFICATE OF SERVICE

I certify that the foregoing Order on Default, dated February 7, 1996, was sent in the following manner to the addressees listed below:


Original by Pouch Mail to: Venessa Cobbs
 Regional Hearing Clerk
 U.S. Environmental Protection
 Agency, Region VII
 726 Minnesota Avenue
 Kansas City, KS 66101

Copy by Certified Mail, Return
 Receipt Requested to:

Counsel for Complainant: Julie M. Van Horn, Esquire
 Associate Regional Counsel
 U.S. Environmental Protection
 Agency, Region VII
 726 Minnesota Avenue
 Kansas City, KS 66101

Copy by Certified Mail, Return
 Receipt Requested, and by First
 Class Mail to:

Respondent: Mr. David L. Redler
 P.O. Box 163
 Palmyra, Nebraska 68418


 Aurora M. Jennings
 Legal Assistant
 Office of Administrative Law
 Judges
 Environmental Protection Agency
 Washington, DC 20460

Dated: February 7, 1995
 Washington, DC

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

BEFORE THE ADMINISTRATOR

| | | |
|-------------------------|---|-------------------------------------|
| IN THE MATTER OF: |) | |
| |) | |
| DAVID L. REDLER d/b/a |) | I. F. & R. Docket No. VII-1185C-93P |
| TREE 'N TURF LAWNSCAPES |) | |
| |) | FINDINGS OF FACT; CONCLUSIONS |
| |) | OF LAW; PROPOSED DEFAULT ORDER |
| Respondent. |) | |

FINDINGS OF FACT

Based upon the record in this matter including the Complaint, the Prehearing Exchange filed by the Complainant and Complainant's Motion for Default Order, I find as follows:

1. The Complainant, by delegation from the Administrator of EPA and Regional Administrator, EPA, Region VII, is the Director of Air and Toxics of the Air and Toxics Division, EPA, Region VII.
2. The Respondent is David L. Redler, a Nebraska certified commercial applicator, #NE 321828, d/b/a Tree 'N Turf Lawnscares, 1401 Old Cheney Road, Lincoln, Nebraska 68512.
3. On or about March 24, 1992, Respondent applied TENN-COP 5E, EPA Registration Number 1109-37 to Nancy Boeche's maple tree on her residential property located at 727 Marshall Avenue, Lincoln, Nebraska.

4. The Boeche property is two doors south and across one residential street from the Will and Kimberly Bax property at 710 Marshall Avenue.
5. Will and Kimberly Bax and their three children were in their front yard of their residence during Respondent's application of TENN-COP 5E to the Boeche property.
6. Will and Kimberly Bax and their three children saw the spray mist of the pesticide drift onto their property during Respondent's application of the TENN-COP 5E and felt the pesticide mist as they stood in their front yard.
7. On or about March 24, 1992, an authorized EPA representative investigated Respondent's application of TENN-COP 5E to the Boeche property.
8. During the March 24, 1992 inspection, the EPA representative collected physical samples from the Bax property.
Subsequent sample results confirmed the presence of copper at 2.3 and 2.5 parts per million (ppm) on a tissue used to wipe Will Bax's eyeglasses and a t-shirt worn by Will Bax.
9. The active ingredient in TENN-COP 5E is copper salts of fatty and rosin acids.
10. The TENN-COP 5E label does not list maple trees as an application site.
11. The TENN-COP 5E label bears the following statements: "DO NOT APPLY THIS PRODUCT IN SUCH A MANNER AS TO DIRECTLY OR THROUGH DRIFT EXPOSE WORKERS OR OTHER PERSONS. THE AREA BEING TREATED MUST BE VACATED BY UNPROTECTED PERSONS..."

12. The calculation of the proposed penalty as evidenced by Exhibit 22 of Complainant's Prehearing Exchange, (attached hereto as Exhibit 2) was completed in accordance with the applicable penalty policy and in accordance with FIFRA.
13. On February 17, 1993 Administrative Law Judge, Daniel M. Head was designated as the Administrative Law Judge to preside in this proceeding.
14. On March 4, 1993 the Presiding Officer issued an Order requiring the parties to file their prehearing exchanges by May 5, 1993.
15. On April 22, 1993 Complainant filed a Motion for an extension of time of the date of the Prehearing Exchange until June 7, 1993.
16. Complainant's Motion for extension of time was granted and the date of the Prehearing Exchange was extended to June 7, 1993.
17. On May 27, 1993 Complainant filed a Motion for an extension of time of the date of the Prehearing Exchange until July 7, 1993.
18. Complainant's Motion for extension of time was granted and the date of the Prehearing Exchange was extended to July 7, 1993.
19. On May 3, 1993 Sonya S. Ekart of Cline, Williams, Wright, Johnson & Oldfather entered an appearance on behalf of the Respondent.

20. On June 3, 1993 Sonya S. Ekart of Cline, Williams, Wright, Johnson & Oldfather filed a Motion to Withdraw as Counsel for the Respondent.
21. On June 23, 1993 Complainant filed its status report.
22. On June 29, 1993 the Court granted the Motion to Withdraw.
23. On July 7, 1993 Complainant filed its Prehearing Exchange.
24. To date Respondent has not filed his Prehearing Exchange.
25. Respondent, by failing to comply with the Presiding Officer's order, has waived his opportunity to present evidence concerning the allegations of the Complaint and his ability to pay the proposed civil penalty and the effect of such payment on Respondent's ability to continue in business.
26. Respondent is the person possessed of Respondent's financial information and thus best situated to bring forth on the record Respondent's financial information.
27. Respondent has a history of prior violations of FIFRA.

CONCLUSIONS OF LAW

Based upon the findings set forth in the Findings of Fact above, it is concluded Respondent violated Section 12 (a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G) by applying TENN-COP 5E in a manner inconsistent with its label by allowing TENN-COP 5E to drift from the application site and by applying it to a site not listed on the label.



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

June 17, 1993

MEMORANDUM

SUBJECT: Calculation of the Proposed Penalty -- David L. Redler
d/b/a Tree 'N Turf Lawnsapes, Lincoln, Nebraska
I.F. & R Docket No. VII-1185C-93

FROM: Kathleen L. Fenton *Kathleen L. Fenton*
Case Development Officer
Pesticides Compliance Monitoring Section
Toxics and Pesticides Branch
Air and Toxics Division

TO: Julie M. Van Horn
Assistant Regional Counsel
Office of Regional Counsel

The proposed penalty in the subject case was calculated in accordance with the July 2, 1990, Enforcement Response Policy (ERP) for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). FIFRA Section 14 states that a registrant, commercial applicator, wholesaler, dealer, or other distributor may be assessed a civil penalty of up to \$5,000 for each violation of FIFRA.

In determining the amount of the civil penalty, Section 14(a)(4) of FIFRA requires the Agency to consider the appropriateness of the penalty to the size of the business of the person charged, the effect of the penalty on the person's ability to continue in business, and the gravity of the violation.

Computation of the penalty amount is determined in a five stage process in consideration of the FIFRA Section 14(a)(4) criteria listed above. These steps are: (1) determination of gravity or "level" of the violation using Appendix A of this ERP; (2) determination of the size of business category for the violator(s), found in Table 2; (3) use of the FIFRA civil penalty matrices found in Table 1 to determine the dollar amount associated with the gravity level of the violation and the size of the business category of the violator(s); (4) further gravity adjustments of the base penalty in consideration of the specific characteristics of the pesticide involved, the actual or potential harm to human health and/or the environment,

the compliance history of the violator, and culpability of the violator, using the "Gravity Adjustment Criteria" found in Appendix B; and, (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business, in accordance with the criteria established in this ERP.

The gravity of the violation and size of the business are considered in the FIFRA Civil Penalty Matrices shown in Table 1, page 19 of the ERP. Each cell of the matrix represents the Agency's assessment of the appropriate civil penalty, within the statutory maximum, for each gravity level of a violation and for each size of business category.

Since FIFRA imposes different statutory ceilings on the maximum civil penalty that may be assessed against persons listed in FIFRA Section 14(a)(1) and persons listed in Section 14(a)(2), this policy has separate penalty matrices for Section 14(a)(1) violators and Section 14(a)(2) violators.

Respondent, David L. Redler, is a Section 14(a)(2) violator and the corresponding penalty matrix was used to calculate the civil penalty assessed Respondent.

The proposed penalty was derived in the following manner:

1. It is a violation for any person to use any pesticide in a manner inconsistent with its labeling. This is a level 2 violation.

2. Respondent was placed in Category I (total business revenues over \$200,000). Respondent is not incorporated, has no record under the Dun & Bradstreet reporting system, and has not volunteered any financial information to otherwise categorize himself and his company.

3. The application of the gravity-based penalty to determine the dollar amount associated with the gravity level of violation and size of business category of Respondent resulted in a base civil penalty of \$1,000.

4. Gravity Adjustment Determinations:

(a) Pesticide Toxicity = Value 1

The pesticide, TENN-COP 5E, used by Respondent, David L. Redler, fits the "Value 1 Circumstances" which are: Signal Word: "Warning."

(b) Harm to Human Health = Value 3

The use of TENN-COP 5E by Respondent fits the "Value 3 Circumstance" in that "Harm to human health is unknown."

(c) Environmental Harm = Value 3

The use of TENN-COP 5E by Respondent fits the "Value 3 Circumstance" in that "Harm to the environment is unknown."

The spraying of Nancy Boeche's maple tree with TENN-COP 5E occurred and TENN-COP 5E residues were found.

The label does not list maple trees as an application site.

(d) Compliance History = Value 0

The Compliance History is determined by past violations and/or warnings issued against the Respondent.

David L. Redler's past violations are as follows:

A Consent Agreement and Final Order were signed on September 24, 1984, regarding an Administrative Civil Complaint that was issued against Respondent on April 12, 1984, alleging a § 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G) violation for using two registered TREFLAN 5G products on lawns.

This was a violation of the TREFLAN 5G label in that it was applied to a site not specified on the labeling. Respondent was served with the Complaint of April 20, 1984.

A Notice of Warning was issued against Respondent on March 9, 1987, for a 12(a)(2)(G) FIFRA violation. LESCO pesticide products were used inconsistent with their labels in that the Respondent rinsed a pesticide/fertilizer spreader and disposed of the rinsate at his apartment complex.

David L. Redler's FIFRA violative history is past five years old. As stated in the ERP: "To be considered a compliance history for the purposes of Appendix B [of the ERP], the violation must have occurred within five years of the present violation." Because Respondent's violations are over five years old, Respondent has received a "Compliance History gravity rating equalling zero." However, because Respondent has been assessed a prior civil penalty by the Administrator of \$500 for the first offense, Respondent will be assessed "no more than \$1,000 for each subsequent offense."

Respondent has received recognition of the age of his violative history reflected in the gravity value assessment, but because Respondent has had prior FIFRA violations EPA is correct in assessing a \$1,000 penalty.

(e) Culpability = Value 2

Culpability unknown.

(f) Total Gravity Assessment

Each "Gravity Adjustment" value is added. The sum of the gravity value points equals nine.

The "Gravity Adjustment Criteria/Table 3", Appendix C of the ERP, page C-1, explains how to assess the total gravity regarding the final penalty.

The Respondent is assessed:

1. a total gravity value of nine points;
2. a nine point gravity value states "assess matrix value;"
3. which means placing the Respondent in the following matrix slot - refer to Appendix C, Summary of Tables, page C-1, Table 1, FIFRA Civil Penalty Matrix/FIFRA Section 14(a)(2)/Level I/level 2;
4. which equals a \$1,000 penalty.

Total penalty assessed against Respondent equals \$1,000.