



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF)
)
JOHN RAY STOUT) DOCKET NO. FIFRA-04-2002-3034
and KP, L.L.C.,)
)
)
RESPONDENT)

ORDER ON RESPONDENT'S MOTION TO AMEND THE PREHEARING ORDER

This civil administrative penalty proceeding arises under the authority of Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 1361(a)(1). The proceeding is governed by the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (the "Rules of Practice"), 40 C.F.R. §§ 22.1-32.

On December 23, 2002, the United States Environmental Protection Agency, Region IV (the "EPA" or "Complainant") filed a Second Amended Complaint against John Ray Stout and KP, L.L.C. ("Respondent"), alleging numerous violations of FIFRA. Complainant has not specified a proposed penalty for these alleged violations. Respondent filed an Answer to the Second Amended Complaint on January 14, 2003, contesting the EPA's jurisdiction over this matter, denying many of the factual allegations made in the Complaint, and raising several affirmative defenses.

In a Prehearing Order entered by Chief Administrative Law Judge Biro on February 27, 2003, the parties were directed to engage in a prehearing information exchange, commencing with Complainant's submission of its initial prehearing exchange on April 18, 2003.^{1/} Pursuant to the Prehearing Order, Respondent's

^{1/} The undersigned was redesignated as the Administrative Law Judge to preside in this proceeding by Order of Redesignation dated March 11, 2003.

prehearing exchange is due May 9, 2003 and Complainant's rebuttal prehearing exchange is due May 21, 2003. Judge Biro's Prehearing Order also directed the parties to file any "dispositive motion regarding liability, such as a motion for accelerated decision or motion to dismiss under 40 C.F.R. § 22.20(a),... **within thirty days after the due date for Complainant's Rebuttal Prehearing Exchange.**" (Emphasis in original).

On April 4, 2003, Respondent filed a Motion to Amend the Prehearing Order ("Motion"). The Motion requests that the Prehearing Order be amended to allow the filing of a motion to dismiss before the filing of the prehearing exchange. As such, Respondent moves for the issuance of an amended prehearing order that sets forth a briefing schedule for Respondent's Motion and that establishes a revised schedule for the prehearing exchange to commence after the court issues a ruling on the Motion. In support thereof, Respondent maintains that legal grounds exist that preclude Complainant from pursuing this action for civil penalties and that a ruling on these issues prior to the prehearing exchange is in the interests of justice and will serve the dual goals of judicial economy and efficiency. Respondent notes that both parties will expend substantial amounts of time and resources to complete the prehearing exchange. Respondent states that Complainant opposes the Motion.

Respondent has incorrectly interpreted the language of the February 27, 2003 Prehearing Order. Contrary to Respondent's stated belief, a motion to dismiss may be filed at any time. Judge Biro's Prehearing Order does not preclude Respondent from filing a motion to dismiss prior to the filing of the prehearing exchange. The language of the Prehearing Order provides that such motion must be filed within thirty (30) days after the due date for Complainant's rebuttal prehearing exchange. In other words, a motion to be dismissed cannot be filed more than thirty (30) days after the last filing date for the rebuttal prehearing exchange.

Moreover, the procedural regulations pertaining to motions to dismiss provide that:

The Presiding Officer,^[2/] upon motion of the respondent,

^{2/} The term "Presiding Officer" means the Administrative Law Judge designated by the Chief Administrative Law Judge to serve as Presiding (continued...)

may at any time dismiss a proceeding without further hearing or upon such limited additional evidence as he requires, 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.

Nonetheless, Respondent's Motion will be considered in view of its mistaken interpretation of the Prehearing Order. Although Respondent notes that both parties probably will expend substantial amounts of time and resources to complete the prehearing exchange, I decline to amend the prehearing information exchange schedule at this time. First, Respondent has not filed the motion to dismiss. Second, Respondent indicates that Complainant opposes the Motion. Finally, the Prehearing Order directs Complainant to address the defenses raised by Respondent in its Answer which include most of the issues raised by Respondent in the instant Motion.^{3/} As such, a stay of the prehearing information exchange is not warranted at this time.

Barbara A. Gunning
Administrative Law Judge

Dated: April 11, 2003
Washington, DC

^{2/} (...continued)
Officer. 40 C.F.R. §§ 22.3(a), 22.21(a).

^{3/} Additionally, the instant Motion was not filed in sufficient time to allow Complainant to respond and for the issuance of a ruling on the Motion. See 40 C.F.R. §§ 22.7(c), 22.16(b).