

8/29/90

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

8/29/90
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| In the Matter of |) | |
| |) | |
| FARMERS UNION CO-OPERATIVE |) | IF&R Docket No. VII-937C-89P |
| ASSN. OF HOWARD COUNTY |) | |
| ST. PAUL, NEBRASKA |) | |
| |) | |
| Respondent |) | |

Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136 et seq. Where respondent failed to comply with the order of Administrative Law Judge requiring the exchange of prehearing information, it was found to be in default, pursuant to 40 C.F.R. § 22.17, to have admitted violation charged, and assessed full amount of penalty proposed in complaint.

ORDER ON DEFAULT

By: Frank W. Vanderheyden Dated: August 29, 1990
Administrative Law Judge

APPEARANCES:

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| For Complainant: | Rupert G. Thomas, Esquire Assistant Regional Counsel Air and Toxic Materials Branch Office of Regional Counsel U.S. Environmental Protection Agency, Region VII 726 Minnesota Avenue Kansas City, Kansas 66101 |
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| For Respondent: | Mr. Lyal Nickel Fertilizer Division Manager Farmers Union Co-op P.O. Box 237 St. Paul, Nebraska 68873 |
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INTRODUCTION

This civil proceeding for the assessment of a penalty was initiated by the U.S. Environmental Protection Agency (complainant) under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA), 7 U.S.C. § 1361, by issuance of a complaint on August 15, 1989, charging respondent, Farmers Union Co-operative Association of Howard County (respondent), with certain violations of the FIFRA and regulations promulgated thereunder. An answer to the complaint was served on October 4, 1989. The answer, in substance denied the allegations in the complaint, contested the amount of penalty sought, and requested a hearing. The complaint charged respondent with the sale of a restricted use pesticide to a person who was not certified to use restricted use pesticides, in violation of Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F). Respondent was also charged with failure to maintain accurate records for commercial applications, in violation of Section 4(a)(1) of FIFRA, 7 U.S.C. § 136b(a)(1), and 40 C.F.R. § 171.11(c)(7). A civil penalty in the amount of \$5,000 was sought by complainant.

FINDINGS OF FACT

Respondent is Farmers Union Co-operative Association of Howard County, Box 237, St. Paul, Nebraska 68873. On or about April 6, 1989,¹ complainant conducted an inspection of respondent's

¹ All dates are for the year 1989 unless otherwise indicated.

facility located in St. Paul, Nebraska. During the inspection, complainant obtained from respondent a copy of the sales records for restricted use pesticides. These records indicated that respondent sold a restricted use pesticide to a person who was not certified to apply restricted use pesticides. During the inspection, complainant obtained from respondent copies of records of commercial applications of restricted use pesticides. This inspection disclosed that respondent failed to maintain accurate records in that it failed to adequately describe the application site and omitted Environmental Protection Agency (EPA) registration numbers of such pesticides.

Following the issuance of the complaint, the matter was assigned to the below Administrative Law Judge (ALJ) on October 18. By order dated October 20, the parties failing settlement, were directed to exchange certain prehearing information consisting of witness lists, documentary evidence and arguments supporting their respective cases no later than December 22. On November 1, the ALJ received a submission from the respondent and on November 8 ordered complainant's response within 20 days. Complainant served its response to this on November 22. The ALJ denied respondent's motion on December 4 and ordered that parties adhere to the prehearing exchange time frames mandated in the order of October 20. By letter dated December 13, complainant advised the ALJ that settlement had not been reached and submitted its prehearing exchange materials and a motion for an accelerated decision pursuant to 40 C.F.R. § 22.20. Respondent failed to

submit its prehearing exchange. On December 28, the ALJ ordered respondent to respond to complainant's motion within 10 days. On June 27, 1990, by certified mail, return receipt requested, respondent was ordered to show cause within 10 days why a default order should not be issued against it, pursuant to 40 C.F.R. § 22.17(a), for failure to respond to the order of December 28.

Respondent has stood mute since its November 1 submission, and failed to respond to the order to show cause of June 27, 1990. On July 20, 1990, an order was issued directing complainant to submit, within 30 days, a draft of a proposed order on default against respondent for review, possible revision and signature by the ALJ. Respondent has not responded to complainant's submission, and it remains silent to this day.

CONCLUSIONS OF LAW

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 1361, complainant has the authority to institute enforcement proceedings against "any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter" Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F) makes it unlawful to sell a restricted use pesticide to a person who is not a certified applicator. Section 4 of FIFRA, 7 U.S.C. § 136b(a)(1), requires, in part, that the seller of a restricted pesticide to keep and maintain complete records concerning the sale of same. Further, Section 3(d)(1)(C)(i) of FIFRA, 7 U.S.C. § 136a(d)(1)(C)(i),

specifies that any pesticide, which is classified for restricted use, "shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator."

The pertinent regulations, 40 C.F.R. § 171.11(c)(7)(i), require respondent to keep and maintain records which contain the name and address of the person for whom the pesticide was applied; location of the pesticide application; target pest(s); specific crop or commodity and site to which the pesticide was applied; date and time of application; trade name and EPA registration number of the pesticide applied; amount applied and percentage of active ingredient; and type and amount of the pesticide disposed of, method of disposal, date(s) of disposal, and location of the disposal site.

Respondent's answer to the complaint did not raise any questions which could support a decision that complainant has failed to establish a prima facie case, or justify the dismissal of the complaint. An examination of the prehearing exchange documents submitted by complainant buttress the allegations in the complaint that respondent sold a restricted use pesticide to a person not certified to use such restricted use pesticide and that it failed to keep and maintain complete records on the commercial application of restricted use pesticides. Complainant has established a prima facie case to support the allegation in the complaint that respondent violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C § 136j(a)(2)(F) and 40 C.F.R. § 171.11(c)(7) promulgated

pursuant to Section 4(a)(1) of FIFRA, 7 U.S.C § 136b(a)(1). Respondent's failure to comply with the prehearing order amounts to a default and constitutes an admission of all facts alleged in the complaint and a waiver of a hearing on the factual allegations. 40 C.F.R § 22.17(a).

ULTIMATE CONCLUSION

It is concluded that respondent is in violation of Section 12(a)(2)(F) of FIFRA, 7 U.S.C § 136j(a)(2)(F) and 40 C.F.R. § 171.11(c)(7), promulgated pursuant to Section 4(a)(1) of FIFRA, 7 U.S.C. § 136b(a)(1).

ORDER²

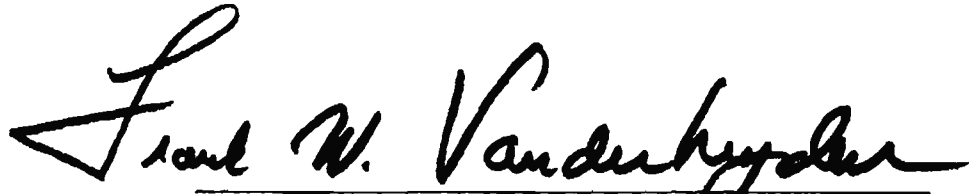
IT IS ORDERED, pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 1361(a), that:

1. Respondent, Farmers Union Co-operative Association of Howard County, be assessed a civil penalty of \$5,000;
2. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States, to the following address within sixty (60) days after the final order is issued:

² Pursuant to 40 C.F.R § 22.17(b), this order on default constitutes the initial decision in this matter. Unless an appeal is taken pursuant to 40 C.F.R. § 22.30, or the Administrator elects to review this decision on his own motion, this decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).

Mellon Bank
EPA - Region VII
Regional Hearing Clerk
P.O. Box 360748M
Pittsburgh, PA 15251

3. Failure upon the part of the respondent to pay the penalty within the prescribed time frame after entry of the final order shall result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.



Frank W. Vanderheyden
Administrative Law Judge

Dated: August 29, 1990