

12/11/92

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
DONALD L. LEE AND PIED PIPER ) Docket No. FIFRA 09-0796-92-13  
PEST CONTROL, INC., )  
 )  
Respondent )

INTERLOCUTORY ORDER FOR PARTIAL  
ACCELERATED DECISION AS TO LIABILITY

Pursuant to Section 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22, I hereby render, sua sponte, a partial accelerated decision in favor of the U.S. Environmental Protection Agency (EPA or Complainant) as to liability in this proceeding without further hearing.

I. The Complaint

This civil administrative proceeding for the assessment of a civil penalty was initiated by the issuance of a complaint by the EPA pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq., (FIFRA). The complaint charges, in nine counts, that Donald L. Lee and Pied Piper Pest Control, Inc. (Respondents) have violated Sections 12(a)(2)(K) and 12(a)(2)(A) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(K) and 136j(a)(2)(A). More specifically, in Counts I through X Respondents are charged with making commercial applications of chlordane after the date of the cancellation order for the chemical

in violation of Section 12(a)(2)(K) of FIFRA. In Count XI, Respondents are charged with violating the Section 12(a)(2)(A) of FIFRA by partially tearing the label on a fifty-five gallon drum of chlordane and replacing it with a different partial label pasted over the drum's original label.

The complaint proposed the assessment of a civil penalty of \$55,000.00 that was calculated in accordance with Section 14(a) of FIFRA [7 U.S.C. § 1361(a)] and the Guidelines for the Assessment of Civil Penalties, 39 Fed. Reg. 27711 (July 31, 1974). The cover letter which transmitted the complaint referred to the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act of July 2, 1990, in describing the calculation of the penalty. The complaint has since been amended (amended complaint) so that "the Enforcement Response Policy for the Federal Insecticide Fungicide and Rodenticide Act dated July 2, 1990" has been substituted for "the Guidelines for the Assessment of Civil Penalties (39 F.R. 27711)" in the complaint. (See Order of September 29, 1992.)

## II. The Answer

On December 18, 1991, counsel for Respondents filed an answer denying the alleged violations. With respect to the proposed penalty, the answer stated that "PIED PIPER PEST CONTROL, INC., a Nevada corporation was prior to the closing of its business a category III business whose gross annual sales never exceeded THREE HUNDRED THOUSAND (\$300,000.00) DOLLARS." Further, the answer

stated that Pied Piper Pest Control, Inc., is no longer in business.

Subsequently, on November 16, 1992, Respondents filed an amended answer to the complaint and a request for a sua sponte determination of liability. In the amended answer Respondents admitted the alleged violations and requested that I "make a sua sponte determination that the Respondents are liable pursuant to the allegations of the Complaint . . . ."

### III. Findings and Conclusions

Based upon the amended complaint and the amended answer, I conclude that an interlocutory order for partial accelerated decision as to liability should be issued, sua sponte, in favor of the Complainant. I therefore make the following findings of fact and/or conclusions of law as alleged in the amended complaint:

1. This is a civil administrative action instituted pursuant to Section 14(a) of FIFRA [7 U.S.C. § 136 et seq]. The Complainant is the EPA Region 9. The Respondents are Donald L. Lee and Pied Piper Pest Control, Inc.

2. Each of the respondents is a "person" as that term is defined in Section 2(s) of FIFRA [7 U.S.C. § 136(s)].

3. Through a series of inspections, EPA credentialed inspectors from the Nevada Department of Agriculture found that between February 1989 and July 1989, Respondent Lee acting on behalf of the Respondents performed termite pretreatment applications using chlordane products at 10 different home construction sites in the Reno, Nevada, area. Chlordane products

used were: 1) 'Termide' with previous EPA Registration number: 876-233; and 2) 'Velsicol's Belt 72EC' with previous EPA Registration number; 876-102 (both products are hereinafter referred to as "Chlordane").

4. In performing the treatments, Respondent Lee acting on behalf of the Respondents applied chlordane after the chemical's cancelation order date. On February 23, 1988, in the case of the National Coalition Against the Misuse of Pesticides v. EPA, the United States District Court for the District of Columbia ordered EPA to cancel all sales and commercial uses of chlordane on or after April 15, 1988.

5. Pursuant to the Court's ruling, EPA published a notice in the 53 Fed. Reg. 68, Friday, April 8, 1988, indicating that "the registrations for the products listed in the Register are canceled, and that pursuant to Section 6(a)(1) of FIFRA, 7 U.S.C. 136d(a)(1), it shall be unlawful for any person to distribute, sell, offer for sale, hold for sale, deliver for shipment, or receive (and having so received) delivered or offer to deliver to any person, or to make commercial use or commercial application of such products, after April 14, 1988."

6. Section 12(a)(2)(K) of FIFRA makes it unlawful for any person to violate any cancelation order issued under FIFRA.

7. Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA [7 U.S.C. § 136 et seq.] may be assessed a civil penalty by the Administrator of the EPA of up to \$5,000 for each offense,

Section 14 of FIFRA [7 U.S.C. § 136j]. The Administrator's authority has been delegated to the Regional Administrator and re-delegated to the Director of the Air and Toxics Division, EPA Region IX (EPA Order 1280-4; EPA Regional Order R1260.27].

8. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about February 23, 1989 Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 1805 Sierra Highland Dr., Lot #4, Reno, Nevada, while under contract with DiLoreto Construction Co., in violation of Section 12(a)(2)(K).

9. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about March 10, 1989, Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 1765 Sierra Highland Dr., Lot #8, Reno, Nevada, while under contract with DiLoreto Construction Co., in violation of Section 12(a)(2)(K).

10. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about April 3, 1989, Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 1308 Longridge Dr., Lot #102, Reno, Nevada, while under contract with Bailey & McGah Construction Co., in violation of Section 12(a)(2)(K).

11. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about April 6, 1989, Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 6510 Enchanted Valley Dr., Lot #91, Reno, Nevada, while under contract with Bailey & McGah Construction Co., in violation of Section 12(a)(2)(K).

12. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about April 13, 1989, Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 1663 Shadow Wood Ct., Lot #35, Reno, Nevada, while under contract with Bailey & McGah Construction Co., in violation of Section 12(a)(2)(K).

13. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about May 4, 1989, Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 5940 Ridge Dr., Lot #30, Reno, Nevada, while under contract with DiLoreto Construction Co., in violation of Section 12(a)(2)(K).

14. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about May 5, 1989, Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 1621 Enchanted Valley Dr., Lot #16, Reno, Nevada, while under contract

with Bailey & McGah Construction Co., in violation of Section 12(a)(2)(K).

15. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about July 22, 1989, Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 1528 Picetti Ct., Lot #8, Fernley, Nevada, while under contract with DiLoreto Construction Co., in violation of Section 12(a)(2)(K).

16. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about July 26, 1989, Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 1532 Picetti Ct., Lot #7, Fernley, Nevada, while under contract with DiLoreto Construction Co., in violation of Section 12(a)(2)(K).

17. EPA credentialed inspectors from the Nevada Department of Agriculture obtained records and conducted laboratory analysis which show that on or about July 28, 1989, Respondent Lee acting on behalf of the Respondents applied canceled Chlordane at 1423 Jenny's Ln., Lot #13, Fernley, Nevada, while under contract with DiLoreto Construction Co., in violation of Section 12(a)(2)(K).

18. According to Section 12(a)(2)(A), it shall be unlawful for any person to detach, alter, deface, or destroy, in whole or in part, any labeling required under this Act.

19. On or about August 11, 1989, EPA credentialed inspectors from the Nevada Department of Agriculture found a fifty-five gallon drum of Chlordane at the property of Respondents, 615 Spice Island

Dr., #7, Fernley, Nevada. The drum's original label was partially torn with a different partial label pasted over the original drum's label in violation of Section 12(a)(2)(A).

IV. Summary and Order

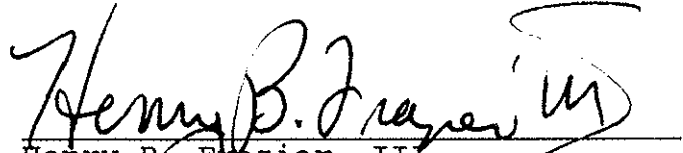
I conclude that no genuine issue of material fact exists as to the question of liability and Complainant is entitled to judgment as a matter of law. I find that Respondents Donald L. Lee and Pied Piper Pest Control, Inc. have violated Sections 12(a)(2)(K) and 12(a)(2)(A) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(K) and 136j(a)(2)(A) as alleged in Counts I, II, III, IV, V, VI, VII, VIII, IX, X and XI of the complaint. Consequently, a partial accelerated decision on the issue of liability on the violations alleged in the complaint should be, and is hereby, rendered for Complainant. Pursuant to 40 C.F.R. § 22.20(b)(2), I further find that the issue of the amount, if any, of the civil penalties, which appropriately should be assessed for the violations found herein, remains controverted and, if necessary, the hearing requested shall proceed for the purpose of deciding that issue.

In the meantime, the parties shall be granted additional time to pursue settlement discussions. If the matter has not been settled and a Consent Agreement and Final Order signed by the parties by January 22, 1993, the prehearing exchange directed by my letter of April 7, 1992, should be mailed or delivered by the Respondents to the Regional Hearing Clerk, the opposing party and the Presiding Officer on January 22, 1993. At the same time, on January 22, 1993, the Complainant may amend its prehearing



exchange. The parties will then have until February 1, 1993, to reply to statements or allegations of the others contained in the respective prehearing exchanges. Thereafter, a date for a hearing will be set in this matter.

So ORDERED.

  
Henry B. Frazier, III  
Chief Administrative Law Judge

Dated: December 11, 1992  
Washington, DC

IN THE MATTER OF DONALD L. LEE AND PIED PIPER PEST CONTROL, INC.,  
Respondent, Docket No. FIFRA 09-0796-92-13

Certificate of Service

I hereby certify that this Interlocutory Order for Partial Accelerated Decision as to Liability, dated DEC 11 1992, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to: Steven Armsey  
Regional Hearing Clerk  
U.S. EPA, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Copy by Certified Mail,  
Return Receipt Requested, to:

Attorney for Complainant: David M. Jones, Esquire  
Assistant Regional Counsel  
U.S. EPA, Region 9  
75 Hawthorne Street  
San Francisco, CA 94105

Attorney for Respondent: John Ohlson, Esquire  
Ohlson & Springgate  
522 Lander Street  
Reno, NV 89509



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Doris M. Thompson  
Secretary

Dated: DEC 11 1992