9/22 --5

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)
	)
Century Products, Inc., a/k/a	)
Clean Earth Products,	)
and	) Docket No. IF&R-IV-94F007-C
Dana L. Turner, a/k/a	)
Organic Technologies, Unlimited,	)
and DLT Laboratories,	)
	)
Respondents	)

ORDER ON MOTIONS

The complaint in this proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA or the Act), 7 U.S.C. §136l(a), issued on December 28, 1993, charged Respondents Century Products, Inc., a/k/a Clean Earth Products, and Dana L. Turner, a/k/a Organic Technologies, Unlimited and DLT Laboratories[1/], with violating Section 12(a)(2)(L) of FIFRA, 7 U.S.C. §136j(a)(2)(L) by producing a pesticide, "Organic Soil and

---

1/ The complaint does not identify "DLT Laboratories", but it apparently is another name under which Respondent, Dana L. Turner, does business. Century Products, Inc., a/k/a Clean Earth Products, is no longer a party to this action pursuant to a Consent Agreement and Consent Order approved on July 20, 1994. Turner filed a motion to strike the Consent Agreement between EPA and Century Products. The Regional Administrator and the Environmental Appeals Board have been delegated the authority to issue consent orders. See 40 CFR §22.18; The EPA Delegations Manual (1200 TN 350, 5/11/94). The ALJ has not been delegated the authority to act upon consent orders. Therefore, the ALJ does not have the authority to strike a consent order. Furthermore, Respondent Turner was not a party to the Consent Order and does not have standing to challenge its validity. Turner apparently rejected any settlement discussions with EPA. Settlement negotiations between EPA and one litigant without the participation of another are not improper. For these reasons, Respondent's motion to strike the Consent Agreement will be denied.

Turf Conditioner," in an establishment not registered with the Administrator of the Environmental Protection Agency (EPA).[2/] The complaint did not allege sale or distribution of an unregistered pesticide. For this alleged violation, Complainant proposes to assess Respondents a civil penalty of $5,000, as permitted by the Act. 7 U.S.C. §136l(a).

Respondent Turner answered the complaint by a document entitled "Response to Civil Complaint, General Denial, Specific Denial to Statements Contained in Complaint; and Notice," dated January 14, 1994. Respondent categorically denied all allegations in the complaint, admitted that he blended a mixture of substances that was marketed as "Organic Soil and Turf Conditioner," but claimed that he had no control over any person for whom he might blend a mixture of substances.[3/] Respondent

---

[2/] FIFRA §12(a)(2)(L) states, "It shall be unlawful for any person ... who is a producer to violate any of the provisions of section 136e of this title." 7 U.S.C. §136j(a)(2)(L). Section 136e(a) states, "No person shall produce any pesticide subject to this subchapter ... unless the establishment in which it is produced is registered with the Administrator." 7 U.S.C. §136e(a).

[3/] Respondent acknowledged blending a mixture of substances called "DLT Mound Leveler". The suggestion that Respondent may be claiming an exemption from the establishment registration requirement as a "custom blender" pursuant to 40 CFR § 167.20(a) is addressed infra. He acknowledged that "DLT Mound Leveler is also known as 'Organic Soil and Turf Conditioner.'" In his answer, Respondent indicated that the formula used for DLT Mound Leveler was identical to that used in Organic Soil and Turf Conditioner. In later pleadings, however, Respondent claimed that the two products were different. The ALJ issued a pre-hearing exchange order on July 6, 1994, directing, inter alia, that Respondent provide a statement as to whether Organic Soil and Turf Conditioner contained essentially the same formula as DLT Mound Leveler and aaNKILL 44 - another of Respondent's products.
(continued...)

alleged that he is not subject to penalty because Organic Soil and Turf Conditioner was not a pesticide.

Subsequent proceedings in this matter consisted of a battery of motions, cross-motions, and responses filed by both parties. Respondent filed a Motion for Accelerated Decision, Summary Judgment and Motion for Interlocutory Ruling, dated March 1, 1994; Motion for Declaratory Judgment, dated March 1, 1994; Amicus Curiae [Brief], dated March 24, 1994; Motion for Accelerated Decision, dated April 27, 1994; Motion to Dismiss Complaint, dated May 17, 1994;[4/] Motion to Find Complainant in Contempt, dated June 8, 1994; Motion for Accelerated Decision, dated June 12, 1994; Sworn Motion That He Believes Proceeding is Prosecuted without Authority, dated June 30, 1994; Motion to Find Pre-Hearing Conference Unnecessary, dated August 10, 1994; Motion to Strike Consent Agreement and Consent Order and Motion to Strike Each and Every Filing of Complainant, dated August 30, 1994; Motion to Dismiss Complaint and Motion to Cross-Complain,

---

(...continued)
Respondent filed a response entitled "Respondent's Motion to Find Pre-Hearing Conference Unnecessary," dated August 10, 1994, in which he stated that the "the ingredients of 'DLT Mound Leveler' and 'Organic Soil and Turf Conditioner' are not identical." However, Respondent did not address whether the products were "essentially" the same and provided no evidence as to differences regarding the products' purpose, function, or mixture. Absent any distinguishing proof from Respondent, the record demonstrates that the DLT Mound Leveler and Organic Soil and Turf Conditioner were essentially the same, if not identical, products and that both were produced by Respondent.

[4/] Respondent's motions for declaratory and summary judgment, for accelerated decision, and for dismissal of the complaint were denied by the order issued July 6, 1994.

dated August 10, 1994; and a Motion to Transfer Civil Complaint to US District Court, dated August 30, 1994. Complainant's motions included a Motion to Strike Amicus Curiae [Brief], dated April 24, 1994; Motion for Official Notice, received April 25, 1994; Motion for Official Notice, dated May 12, 1994; Pre-hearing Exchange, dated August 12, 1994; Supplement to Pre-hearing Exchange, dated August 25, 1994; Request to Limit Motions and Response to Motions, dated August 25, 1994; and a Motion for Partial Accelerated Decision and Brief in Support thereof, dated September 30, 1994.[5/] Pursuant to the ALJ's order issued July 6, 1994, the parties filed Pre-hearing exchange information.[6/]

[5/] Responses and cross-motions not listed above included Respondent's Reply to Complainant's Memorandum Brief in Opposition to Respondent's Motion for Summary Judgment; Respondent's Motion to Strike EPA's Motion for Official Notice; Respondent's Motion to Strike Complainant's Motion to Strike Amicus Curiae; Respondent's Reply to Complainant's Reply to Motion to Find Complainant in Contempt; Respondent's Reply to Complainant's Motion for Partial Accelerated Decision; Complainant's Memorandum Brief in Opposition to Respondent's Motion for Summary Judgment; Complainant's Reply to Respondent's Prayer for Interlocutory Ruling and Criminal Prosecution; Complainant's Response in Opposition to Respondent's Motion for Declaratory Judgment; Complainant's Reply to Respondent's Reply to Complainant's Brief in Opposition to Respondent's Motion for Summary Judgment; Complainant's Reply to Respondent's Motion Regarding Amicus Curiae Brief; Complainant's Reply to Respondent's Motion to Strike Complainant's Motion for Official Notice; Complainant's Reply to Motion to Find Complainant in Contempt; Complainant's Opposition to Respondent's Motion to Strike Consent Agreement and Consent Order; Complainant's Reply in Opposition to Respondent's Motion for Accelerated Decision; and Complainant's Reply to Respondent's Motion to Dismiss Complaint.

[6/] Respondent's Motion to Find Pre-Hearing Conference Unnecessary, dated August 10, 1994, provided information in response to the order, dated July 6, 1994.

Respondent did not list any prospective witnesses and restated his position that a pre-hearing conference was unnecessary.

Respondent, appearing pro se, has presented some of his pleadings and arguments in an irregular manner. Nevertheless, all arguments presented by the parties have been considered.[7/] Issues not specifically addressed below are either rejected or considered to be of no consequence to the decision. Respondent has repeatedly requested dismissal of this proceeding. Any new grounds for dismissal are addressed below. Arguments previously rejected are rejected again for the reasons stated in the previous order. Any future motions that address issues resolved by this order and the order, dated July 6, 1994, will not be considered and responses to such redundant motions are not necessary.

Discussion

I. Respondent's Motion to Dismiss

Respondent filed several motions for dismissal of the complaint for lack of jurisdiction, alleging that EPA cannot bring a civil action against a producer of pesticides pursuant to FIFRA §14(a). Section 14(a)(1) states that "any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor" who violates the Act is subject to civil penalties,

---

[7/] See, Conley v. Gibson, 355 U.S. 41, 48 (1957)("the purpose of pleading is to facilitate a proper decision on the merits"); Yaffe Iron & Metal Company, Inc. v. U.S. Environmental Protection Agency, 774 F. 2d 1008, 1012 (10th Cir. 1985) (administrative pleadings are intended to be "liberally construed" and "easily amended").

whereas section 14(b)(1) states that "any registrant, applicant for a registration, or producer who knowingly violates any provisions of this subchapter [Act]" is subject to criminal sanctions.[8/] Because "producer" appears in section 14(b) and not in section 14(a), Respondent is apparently arguing that EPA may only pursue a section 14(b) criminal prosecution against a pesticide producer and may not pursue section 14(a) civil penalties. Congress enacted the civil penalties provision in order to provide EPA with a method of enforcing FIFRA without imposing criminal sanctions.[9/] Section 14(a)(1) provides more severe penalties against one who commits an unlawful act in a commercial capacity.

The question is whether Respondent is a "registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor" within the meaning of FIFRA § 14(a)(1) and is thus subject to a civil penalty. Respondent is not a "registrant" nor

---

[8/] By requesting the ALJ to bring criminal action against EPA, Respondent misunderstands the application of §14(b). FIFRA does not provide a private cause of action against EPA or EPA officials, nor does the ALJ have the authority to file such an action. The EPA Delegations Manual (1200 TN 350, 5/11/94) indicates that the authority to refer criminal matters under FIFRA to the Department of Justice for investigation and prosecution has been delegated to the Assistant Administrator for Enforcement and Compliance Assurance, that it may be redelegated to the Director, Office of Criminal Enforcement, that it may be redelegated to the Division Director level and not further redelegated.

[9/] S. Rep. No. 838, 92d Cong., 2d Sess. (1972) reprinted in 1972 U.S.C.C.A.N. 3993, 4019 ("While the criminal provisions may be used where circumstances warrant, the flexibility of having civil remedies available provides an appropriate means of enforcement without subjecting a person to criminal sanctions").

a "commercial applicator." The terms "wholesaler," "dealer" and "retailer" are not defined in the statute and it may be presumed that the ordinary meaning of these terms was intended. The primary distinction between a "wholesaler" and a "retailer" is that the wholesaler buys to resell generally to a retailer, while the retailer buys to sell to the ultimate user or consumer. Words and Phrases, "Wholesaler." Likewise, the common understanding of "dealer" is one who buys to resell. Blacks Law Dictionary, 399 (6th ed. 1990). As the "producer" of the product, Respondent may contend that he does not buy the product for resale and thus is not a "wholesaler, dealer or retailer" within the meaning of §14(a)(1).

Although the arrangement between Respondent and Century Products is not altogether clear, Respondent produced "Organic Soil and Turf Conditioner" at Century Products' location and either sold or held the product for distribution and sale at that location.[10/] Furthermore, Respondent provided an exhibit which reports that he sold the substance.[11/] Nothing precludes Respondent from being simultaneously a "producer" and a "distributor." Therefore, even if Respondent is not a

---

[10/] "Dana L. Turner did manufacture this product with the intent that it be ... used by consumers ... to level fire ant mounds ..." Respondent's Response to Civil Complaint, General Denial, Specific Denial to Statements Contained in Complaint; and Notice, dated Jan. 4, 1994, at I(G).

[11/] Exhibit to Respondent's Motion to Dismiss Complaint dated May 17, 1994: Mac Gordon; "Mosquitoes, fire ants got you itching? Try these new products," Clarion-Ledger, Mar.16, 1993. The article states that Turner "sells the product to highway maintenance departments, research stations and the like."

"wholesaler, dealer or retailer" as commonly understood, he would, nevertheless, be an "other distributor," i.e., in a category similar to those listed, and thus properly subject to a civil penalty under §14(a)(1).

Pursuant to the Consolidated Rules of Practice, the undersigned was designated as Presiding Officer in this proceeding. 40 CFR §§22.21 and 22.35. Therefore, the ALJ has jurisdiction to address the complaint, rule upon motions, and issue all necessary orders. 40 CFR §22.04(c).

For the reasons stated above, Respondent's motions to dismiss will be denied.[12/]

[12/] Respondent has repeatedly argued that EPA's regulations are without proper statutory authority and are unenforceable. However, I see no justification for straying from the general rule that challenges to the validity of agency regulations are rarely entertained in an administrative enforcement proceeding absent the most compelling of reasons. See e.g., In the Matter of South Coast Chemical, Inc, 2 E.A.D. 139, 145, FIFRA 84-4 (CJO, March 11, 1986); In the Matter of American Ecological Recycle Research Corp., 2 E.A.D. 62, 64, RCRA 83-3 (CJO, July 18, 1985).

Alleging misconduct on the part of EPA agents and personnel, Respondent has also requested that the ALJ initiate various legal actions including expanding the claim, transferring the cause to Federal district court, and initiating criminal proceedings. The ALJ does not have the authority to act as Respondent has requested. See 40 CFR §22.01(a)(1); 40 CFR §22.04(c). Complainant had reason to believe that Respondent violated FIFRA. Complainant filed a civil complaint pursuant to authority granted to the Administrator in FIFRA and delegated to EPA enforcement agents. I see no basis for Respondent's allegations of misconduct. There is no evidence that EPA representatives conducted themselves other than professionally throughout the course of the investigation and subsequent proceedings. For these reasons, Respondent's related motions will be denied.

Respondent repeated his allegations of misconduct by EPA officials and requested that the matter be transferred to federal district court in a letter to Chief Administrative Law Judge Jon Lotis, dated September 1, 1995. For the reasons stated above,

(continued...)

II. Environmental Protection Agency's Motion for Official Notice and Respondent's Motion to Strike Environmental Protection Agency's Motion for Official Notice

Complainant filed Motions for Official Notice of court rulings in Texas and Mississippi that involved the same litigants and issues similar to this case. The ALJ may take "official notice" of "any matter judicially noticed in the Federal courts." 40 CFR §22.22(f). Judicial notice permits the court to "accept as conclusive" facts that are "essentially uncontestable." See **Federal Rule of Evidence** 201; C.B. Mueller & L.C. Kirkpatrick, **Federal Evidence** §48, §55 (2d ed. vol. I 1994). The Texas and Mississippi court rulings are publicly available and therefore otherwise accessible.[13/] Therefore, official notice is taken of the existence of the rulings of the Federal District Court for the Southern District of Mississippi, Jackson Division, which held that DLT Mound Leveler was a pesticide, and the Texarkana Court of Appeals, which upheld the trial court's ruling that aaNKILL 44, Plus Water Activator, and DLT Mound Leveler were all substantially the same product and were pesticides as a matter of law.

III. Complainant's Motion for Accelerated Decision

Complainant filed a Motion for Accelerated Decision, dated

(...continued)
this request will also be denied. See also, footnote 9 for additional explanation as to the limits of the ALJ's authority and Respondent's right to bring action against EPA.

[13/] Turner v. U.S.E.P.A., 848 F.Supp. 711 (S.D. Miss. 1994); Turner v. State of Texas, 850 S.W.2d 210 (Tex. Ct. App. 1993).

September 30, 1994, pursuant to C.F.R. §22.20 and a memorandum in support thereof (motion).[14/] The motion alleges, generally, that no genuine issue of material fact exists with respect to liability and therefore Complainant is entitled to judgment as a matter of law. Specifically, Complainant alleges that Respondent produced Organic Soil and Turf Conditioner at 6751 Highway 431 South in Brownsboro, Alabama (6751 Highway 431), an unregistered facility, and that Organic Soil and Turf Conditioner is a pesticide.

A pesticide may not be produced in an unregistered establishment. 7 U.S.C §12(a)(2)(L). An "establishment" is defined as a place where a pesticide is "produced ... for distribution or sale." 7 U.S.C. §2(dd). "Distribution or sale" includes holding for distribution and holding for shipment." 7 U.S.C. §2(gg). Thus, Complainant must demonstrate that Respondent has either distributed, sold, or held for

---

[14/] Respondent argues that the ALJ may only consider an accelerated decision in favor of Respondent pursuant to 40 CFR §164.91. "Respondent" as used in Part 164 refers to the Assistant Administrator for Hazardous Materials Control (§164.2(s)). Moreover, Part 164 governs hearings under Section 6 of the Act, e.g., cancellation or suspension of registration, and is inapplicable to this proceeding under section 14(a). Proceedings under section 14 are governed by the Consolidated Rules of Practice, 40 CFR Part 22 (§§22.01 and 22.35). Section 22.20 provides in pertinent part: "The Presiding Officer...may at any time render an accelerated decision in favor of the complainant or the respondent as to all or any part of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law, as to all or any part of the proceeding."

distribution, sale, or shipment the product that he produced at an unregistered facility. See, Holmquist Grain & Lumber Co., FIFRA Appeal No. 83-3, 2 EAD 18, n.1 (CJO, April 25, 1985).

An EPA inspector collected a sample of Organic Soil & Turf Conditioner on April 19, 1993 from Century Products, Inc.'s facility at 6751 Highway 431. It is undisputed that 6751 Highway 431 is an unregistered facility. Complainant provided photographs and a sworn statement of the facility owner to prove that Respondent produced Organic Soil and Turf Conditioner at that facility. Respondent has not raised a material issue regarding whether he produced the substance at that location.

Respondent admits that he mixed a substance marketed as Organic Soil and Turf Conditioner. However, his assertion that he "mixed" the substances and "has no control over the parties for whom he might blend a substance" suggest that he may be contending that he is a "custom blender" exempt from establishment registration requirements pursuant to 40 CFR §167.20(a)(1). A custom blender is "any establishment which provides the service of mixing pesticides to a customer's specifications..." 40 CFR §167.3. For all that appears, Respondent manufactured the product according to his own specifications and there is no evidence that it was mixed "to the order of any customer." Respondent did not mix Organic Soil and Turf Conditioner for use on a specific customer's property, but with the intention that it would be distributed to retail establishments and end users. A pesticide producer is "the

person who manufactures, prepares, compounds, propagates, or processes any pesticide..." 7 U.S.C. §136(w). Although "mixing" and "blending" are not specifically mentioned in the statute, these terms are considered to be synonyms for "compounding" or "processing" or are indistinguishable therefrom. Therefore, Respondent was not a "custom blender," but was the producer of a substance called Organic Soil and Turf Conditioner.[15/]

As discussed above, Respondent produced the product for sale or distribution. Therefore, the sole remaining issue to be addressed is whether Organic Soil and Turf Conditioner is a pesticide.

Respondent produced identical or nearly identical products under four different names: aaNKILL 44, Plus Water Activator, DLT Mound Leveler, and Organic Soil and Turf Conditioner. The United States District Court for the Southern District of Mississippi and the Texarkana Court of Appeals held that the previous incarnations of Organic Soil and Turf Conditioner: aaNKILL 44, Plus Activator, and DLT Mound Leveler, are pesticides. Respondent admitted on several occasions that Organic Soil and Turf Conditioner is the same product as DLT

[15/] A custom blender is a pesticide producer subject to registration requirements not exempted by statute, regulations, or EPA compliance policy. See In re Boyer Valley Fertilizer Co. FIFRA Appeal No. 93-2 (EAB, July 26, 1994). Because Respondent is not a custom blender as defined by the act, it is not necessary to review applicability of the regulations and compliance policy regarding exemptions from registration requirements for custom blenders.

Mound Leveler and is intended for the same purpose.[16/] Therefore, Organic Soil and Turf Conditioner is a pesticide under the cited court decisions.

The doctrine of collateral estoppel is to the effect that once an issue is adjudicated in a court of competent jurisdiction between the same parties and there is a ruling on the merits, other courts are precluded from relitigating the same issue. The parties in the Mississippi litigation included the parties in this proceeding: Dana L. Turner and the U.S. Environmental Protection Agency. Therefore, the Mississippi decision estops the litigants from relitigating the issue in other legal fora. The decision of the Federal District Court in Mississippi, however, was based in part upon giving preclusive effect to the decision of the Texarkana Court of Appeals. The Texas proceeding did not involve the parties present here. In Texas, the litigants were essentially Mr. Turner and the State of Texas. U.S. E.P.A., the Complainant here, was not a party to that action. Because the Mississippi decision was partially based upon the Texas decision, which I find persuasive but not controlling, I will examine the arguments presented by Respondent

---

[16/] For example, in a letter to the Mississippi Department of Transportation, Respondent stated, "DLT Mound Leveler has been changed in name only; to Organic Soil and Turf Conditioner. The formula, method and purpose has not changed." Letter from Dana L. Turner to Mississippi Dept. of Transportation and Gary Hillman, dated April 7, 1993. Respondent also admitted in his Motion to Dismiss Complaint, dated May 17, 1994 at II(C)(3)(b4) that "the ingredients contained in said products [Organic Soil and Turf Conditioner, DLT Mound Leveler, Plus Water Activator, and aaNKILL 44] are identical, thus effect is identical."

for his contention that Organic Soil and Turf Conditioner is not a pesticide and will decide the case upon its merits.

Even if I were to accept Respondent's claim that DLT Mound Leveler and Organic Soil and Turf Conditioner are two different products, I would nevertheless find that Organic Soil and Turf Conditioner is a pesticide. Respondent proposes that Organic Soil and Turf Conditioner is not a pesticide because 1) it is a soil amendment and is exempt from registration under 40 CFR §152.8(c)(4); 2) the label does not contain any direct or implied pesticidal claims; 3) Respondent did not advertise the product as a pesticide; 4) it is a cleaning agent and is exempt from registration under 40 CFR §152.10(a); and 5) Respondent did not intend for the product to be used as a pesticide.[17/]

Respondent's claim that Organic Soil and Turf Conditioner is a soil amendment is without merit. The purpose of a soil amendment is to "improve soil characteristics favorable to plant growth". 40 CFR §152.8. Respondent argues that his product is a soil amendment because it's purpose is to condition the soil by attacking the mounds created by fire ants. Arguing that his product "cleans" the soil by eliminating oil, Respondent does not

---

[17/] Respondent advances many confusing and circular arguments to support his contention that Organic Soil and Turf Conditioner is not a pesticide. For example, he contends that Organic Soil and Turf Conditioner is not a pesticide because it does not contain an "active ingredient" and that pesticides which present little or no risk to organisms other than pests are not intended to be regulated. Respondent's arguments not discussed below are either not substantiated by the evidence presented, or are not supported by the definitions and legal standards of FIFRA and its supporting regulations.

explain how this would be favorable to plant growth. Respondent does not propose that eliminating the oil would stimulate plant growth in areas where fire ants are absent, nor does he suggest that his product provides nutrients beneficial to plant growth. Therefore, Organic Soil and Turf Conditioner does not function as a soil amendment.

Section 2(u) of FIFRA, 7 U.S.C. §136(u), defines a pesticide as, "(1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, and (2) any substance or mixture of substances intended for use as a plant regulator, defoliant, or desiccant." The FIFRA supporting regulations describe specific indicators of whether a product is intended for use as a pesticide.

> A substance is a pesticide if:
>
> (a) The person who distributes or sells the substance claims, states, or implies (by labeling or otherwise):
>
> > (1) That the substance ...can or should be used as a pesticide;... or
>
> (b) The substance consists of or contains one or more active ingredients and has no significant commercially valuable use as distributed or sold other than (1) use for pesticidal purpose ...; or
>
> (c) The person who distributes or sells the substance has actual or constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal purpose.

40 CFR §152.15.

Respondent has carefully drafted the label for Organic Soil and Turf Conditioner so that the label does not make any pesticidal claims. However, a determination whether the product is intended for use against pests does not end with a review of

the product's label. "Industry claims and general public knowledge can make a product pesticidal notwithstanding the lack of express pesticidal claims by the producer itself. Labeling, industry representations, advertising materials, effectiveness and the collectivity of all the circumstances are therefore relevant." N. Jonas & Co. v. U.S., 666 F.2d 829, 833 (3d Cir. 1981).

The advertising materials for Organic Soil and Turf Conditioner, the representations of sales agents, and general public practice establish that the only intended use for the product is to mitigate, destroy or repel fire ants. One pamphlet, announcing "Please, No More Pesticides!!! Introducing ..... Organic Soil and Turf Conditioner," offers the product as "a natural alternative to hazardous and ineffective pesticides."[18/] Suggesting that the "problem is the fire ant mound," this pamphlet informs the user that "one hundred percent of the mounds on your property can be eliminated." Despite the pamphlet's suggestion that the product is not a pesticide, the obvious purpose of the product is to mitigate or eliminate fire ants, because the only means of permanently eliminating the

---

[18/] Complainant's Pre-hearing Exchange exhibit 40. A "natural" pesticide must still be registered by EPA and produced in an EPA registered facility. EPA's responsibility includes reviewing claims, such as those presented by Respondent, that a product is nontoxic and nonhazardous. Once EPA determines that a product and the manner in which it is proposed to be used will not cause unreasonable adverse effects on the environment, EPA registers the product. EPA must regulate natural and nonhazardous products as well as toxic and hazardous chemicals in order to verify their safety and provide the public with information regarding their proper use.

mounds caused by fire ants is to eliminate the ants themselves. Another pamphlet states in large letters: "Is it Fire Ant Feeding Season Yet?"[19/] Proposing to eliminate the energy source upon which fire ants feed, this advertisement clearly shows that Organic Soil and Turf Conditioner is used to mitigate fire ants. Retailers placed Organic Soil and Turf Conditioner on the shelf alongside other pesticide products used to eliminate ants,[20/] sales agents represented that the product could be used to eliminate fire ant mounds,[21/] and purchasers of the product believed that its only intended use was to control fire ants.[22/]

[19/] Complainant's Pre-hearing Exchange exhibit 40.

[20/] See generally, Preliminary Inspection Report dated May 4, 1993, Complainant's Pre-hearing Exchange exhibit 13; Photographs of Organic Soil and Turf Conditioner on the marketplace shelf with other pesticides, Complainant's Pre-hearing Exchange exhibit 36.

[21/] See generally, Preliminary Inspection Report dated May 4, 1993, Complainant's Pre-hearing Exchange exhibit 13; Sworn statement of F. Miller, "I was contacted by a sales representative... regarding a product for fire ant control labeled as "Organic Soil & Turf Conditioner," Complainant's Pre-hearing Exchange exhibit 33; sworn statement of D. Kilgo, "I recall that a salesman conducted a demonstration of Organic Soil & Turf Conditioner...During the demonstration the salesman indicated that the product would either destroy the fire ant queen or would somehow get rid of the fire ants...It was my clear understanding that the product was intended to control fire ants," Complainant's Pre-hearing Exchange exhibit 34; sworn statement of R. Baily, "[The salesman] demonstrated the product as a fire ant control and stated that the product did kill fire ants," Complainant's Pre-hearing Exchange exhibit 35; sworn statement of G. Ware, "It was my understanding that the product was an organic, non toxic, fire ant control product...[the salesman] told me that the product was an organic soil conditioner, but would also kill fire ants," Complainant's Pre-hearing Exchange exhibit 36.

[22/] Id.

Sellers of Organic Soil and Turf Conditioner clearly intended that consumers use the product as a pesticide to mitigate or kill fire ants.

Respondent's claim that Organic Soil and Turf Conditioner is a cleaning agent is equally unpersuasive. Cleaning agents are not pesticides unless a pesticidal claim is made on their labeling or in connection with their sale and distribution. 40 CFR §152.10. Respondent claims that Organic Soil and Turf Conditioner is a cleaning agent because it "cleans" the soil by removing excess oil.[23/] However, a pesticide may have other uses and still require pesticide registration. See N. Jonas & Co., Inc v. U.S., 666 F.2d 829, 832 (3d Cir. 1981). As discussed above, the advertising material distributed with Organic Soil and Turf Conditioner made pesticidal claims, retailers placed the product alongside other pesticides that attack fire ants, and sales representatives indicated that consumers should use the product for this pesticidal purpose. Because cleaning agents are also defined as pesticides if pesticidal claims are made in connection with their sale and distribution, Organic Soil and Turf Conditioner is a pesticide, even if it could also be described as a cleaning agent.

[23/] Respondent provides no scientific data or expert corroboration to substantiate his assertion that Organic Soil and Turf Conditioner functions in this manner. I have determined that this product is a pesticide, because pesticidal claims were made in conjunction with its sale and distribution. It is not necessary to address whether Organic Soil and Turf Conditioner also qualifies as a cleaning agent.

Respondent's representations about the purpose and function of Organic Soil and Turf Conditioner establish that it is a pesticide, despite Respondent's insistence otherwise. Respondent claims that Organic Soil and Turf Conditioner eliminates oil that fire ants consume as food and need to survive. A product is not only a pesticide if it attacks and kills the pest, but also if it "mitigates, repels, or prevents" their existence. 7 U.S.C. §136(u). The ALJ has held that "[d]epriving a pest of a host substance which is essential for [its] existence mitigates the pest and therefore is still a pesticidal claim." In re N. Jonas & Co., Inc. I.F.&R. Docket No. III - 121C, n.10 (July 27, 1978)(concluding that a substance which would deprive bacteria of a source of nutrients which tended to "make them less severe, intense, or to alleviate their number" was a pesticide), upheld by N. Jonas & Co. v. U.S., 666 F.2d 829 (3d Cir. 1981). Respondent's claim that Organic Soil and Turf Conditioner is intended to eliminate a food source for fire ants demonstrates that the product was intended to be used by consumers as a pesticide.

Respondent intended for consumers to use Organic Soil and Turf Conditioner to repel, mitigate, or kill fire ants in order to eliminate the pests and the mounds they create. Respondent has not presented any significant purpose for the product other than as a control against fire ants. Carefully drafting the name and label of the product, eliminating any references from the label, and carefully wording the advertising will not circumvent

the intended purpose and subsequent use of the product as a pesticide when there is no other useful purpose for the product.

There being no dispute as to material fact that Respondent produced a pesticide, for sale or distribution, in an unregistered facility and therefore violated the statute as alleged in the complaint, Complainant's motion for a partial accelerated decision as to liability is granted and Respondent is determined to be liable for a civil penalty for this violation.

ORDER

1. Respondent's several motions to, inter alia, dismiss the complaint, for accelerated decision, to strike the consent agreement and consent order entered into with Century Products, to strike the complaint, to institute criminal proceedings against EPA officials and to transfer this action to U.S. District Court (supra notes 1, 8 and 12, text at 3) are denied.

2. Complainant's motions that official notice be taken of the decisions of the U.S. District Court for the Southern District of Mississippi and the Texas Court of Appeals (supra note 13) and for an accelerated decision that Respondent violated the Act as alleged in the complaint are granted.

3. The amount of the penalty remains at issue and will be determined after further proceedings, including a hearing, if necessary.[24/]

Dated this 22nd day of September 1995.

Spencer T. Nissen
Administrative Law Judge

[24/] Respondent also requested attorneys fees and damages. Only prevailing parties are entitled to attorneys fees under the Equal Access to Justice Act and Respondent has not prevailed in this case. 5 U.S.C. §504. See In the Matter of Exsterex, Inc., 2 E.A.D. 130 n.7, FIFRA No. 85-3 (CJO, Dec. 13, 1985). Neither FIFRA nor the regulations governing this proceeding provide authority to award damages. Id.

In the letter to Chief Administrative Law Judge Jon Lotis, dated September 1, 1995 (supra note 12), Respondent complained of the length of time these motions have been pending. The ALJ regrets the delay, which is due to the large volume of cases on his docket. This delay, however, presents no basis for my disqualification or recusal, and, if Respondent's complaint is intended as a motion to that effect, the motion is denied.

CERTIFICATE OF SERVICE

I hereby certify that the original of this **ORDER ON MOTIONS**, dated September 22, 1995, **in re: Century Products, Inc., a/k/a Clean Earth Products, and Dana L. Turner, a/k/a Organic Technologies, Unlimited, and DLT Laboratories, Dkt. No. IF&R-04-94F007-C**, was mailed to the Regional Hearing Clerk, Reg. IV, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Helen F. Handon
Legal Staff Assistant

Date: September 22, 1995

ADDRESSEES:

Mr. Dana L. Turner
R2 B192
Diana, TX 75640

Alan E. Dion, Esq.
Office of Regional Counsel
U.S. EPA, Region IV
345 Courtland Street
Atlanta, GA 30365

Ms. Julia P. Mooney
Regional Hearing Clerk
U.S. EPA, Region IV
345 Courtland Street
Atlanta, GA 30365