UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Scotts-Sierra Crop Protection Company

Respondent **Docket No. FIFRA-09-0864-C-95-03**

ORDER GRANTING MOTION FOR ACCELERATED DECISION ON LIABILITY

The Region 9 Office of the United States Environmental Protection Agency (The "Complainant" or "EPA") filed a Complaint on January 26, 1996 against Scotts-Sierra Crop Protection Company ("Respondent" or "Scotts-Sierra"), a pesticide producer located in Milpitas, California. Pursuant to an Order of the Administrative Law Judge ("ALJ"), Complainant filed its Second Amended Complaint (the "Complaint") on May 1, 1996. Respondent filed its Answer on May 22, 1996.

The Complaint charges Respondent with 157 violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") Section 12(a)(1)(A), 7 U.S.C. §136j(a)(1)(A), selling an unregistered pesticide, and FIFRA Section 12 (a) (2) (K) , 7 U.S. C. §136j (a) (2) (K) , violating a cancellation order. EPA proposed a total civil penalty of $785,000.00, assessing a $5,000.00 penalty for each alleged violation, the maximum authorized pursuant to FIFRA §14(a)(1), 7 U.S.C. §1361(a)(1).

Pursuant to Section 22.20 (a) of the EPA Rules of Practice, 40 C. F. R. §22. 20 (a) , Complainant filed a Motion f or Accelerated Decision on June 4, 1996 with respect to Respondent's liability on all counts. On June 26, 1996, Complainant filed a separate Motion to Strike Defenses. In an Order dated August 19, 1996, the ALJ denied Complainant's Motion to Strike Defenses with respect to Respondent's third through seventh affirmative defenses.

On September 25, 1996, Respondent filed its Motion to Dismiss and its response to Complainant's Motion for Accelerated Decision. The parties each filed a further response and reply to the respective cross-motions for accelerated

decision, with the pleading cycle ending on or about December 5, 1996. This ruling grants Complainant's motion for an accelerated decision on liability, and denies Respondent's motion to dismiss this proceeding.

Factual Background and Arguments of the Parties

Complainant asserts that there are no genuine issues of material fact with regard to Respondent's liability for selling unregistered or canceled pesticides. Respondent, in support of its motion for dismissal, alleges that EPA failed to provide valid notice of the cancellation of the subject pesticides, as required by FIFRA Section 6(f)(2).

The Respondent, Scotts-Sierra, was known as the Grace-Sierra Crop Protection Company ("Grace-Sierra") before its acquisition by the Scotts Company in December 1993. At the time of the alleged violations, Grace-Sierra operated a facility in Milpitas, California that produced and distributed pesticide products containing ethylene bisdithiocarbamates ("EBDC") , DUOSAN WSB (Reg. No. 5815-28), and ZYBAN (Reg. No. 5815-11).

On March 2, 1992, the EPA Administrator published a "Notice of Intent to Cancel and Conclusion of Special Review" in the Federal Register, for all registrations of pesticide products containing EBDC (57 FR 7484) . In order to avoid cancellation of their registrations, all registrants affected by the Notice were required to file an application for amendment of their registration as set forth in the Notice, on or before April 1, 1992, or within thirty days of the date of receipt of the Notice. Respondent did not file such an application for an amendment of its registration for its EBDC-containing products, until May 1993, when it learned of the notice through further contacts with EPA. In the interim, as admitted in its Answer, Respondent sold its EBDC products on some 157 occasions without the modified label required by the notice of intent to cancel.

EPA asserts that it sent a copy of the Notice to all registrants of pesticide products containing EBDC, including Respondent, by certified mail, return receipt requested as required by FIFRA Section 6(f)(2). EPA has submitted a copy of the return receipt, which indicates the date of delivery of the notice to Grace-Sierra on March 13, 1992. (Ex. 1, Complainant's Motion) . The return receipt clearly states Respondent's correct address. The signature on the return receipt is an illegible scrawl, in which no letters can be readily identified.

Respondent claims that it did not receive actual notice of EPA's intent to cancel the registration until May 1993, and that EPA failed to make reasonable efforts to accomplish delivery of the notice. Respondent contends that EPA failed to follow officially approved U.S. Postal Service certified mail procedures, and failed to properly track its notification system. Respondent argues that this failure rendered the cancellation ineffective, precluding its liability for the sales alleged in the Complaint.

Discussion

Section 22.20(a) of the EPA Rules of Practice, 40 C.F.R. 22.20(a), authorizes the ALJ to "render an accelerated decision in favor of the complainant or 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." In addition, the Presiding Officer, upon motion of the respondent may dismiss an action on the basis of "failure to establish a prima facie case or other grounds which show no right to relief." The motion for accelerated decision is analogous to a motion for summary judgment under Rule 56 of the Federal Rules of Civil Procedure.

FIFRA Section 6 (f) (2) prescribes the procedures EPA must follow in the publication of a notice of intent to cancel.

"A notice of denial of registration, intent to cancel, suspension, or intent to suspend issued under this subchapter . . . shall be published in the Federal Register and shall be sent by certified mail, return receipt requested, to the registrant's or applicant's address of record on file with the Administrator. If the mailed notice is returned to the Administrator as undeliverable at that address, if delivery is refused, or if the Administrator otherwise is unable to accomplish delivery of the notice to the registrant or applicant after making reasonable efforts to do so, the notice shall be deemed to have been received by the registrant or applicant on the date the notice was published in the Federal Register.

FIFRA Section 6(f)(2) thus requires EPA to both publish a notice in the Federal Register and send notice by certif ied mail, return receipt requested to Respondent. EPA is required to make reasonable efforts to deliver the certified mail notice. Where EPA makes such reasonable efforts, but is unable to

accomplish delivery, Respondent is deemed to have received notice as of the date of the Federal Register publication.

The Complainant here has shown there is no genuine issue of fact with respect to its compliance with the notice requirements of FIFRA. The evidentiary materials submitted show that Complainant actually accomplished delivery of the notice on Respondent. Even if it had not, EPA made reasonable efforts to do so. Therefore, Respondent is deemed to have received the notice of intent to cancel, either upon the date of its actual receipt, March 13, 1992, or the date it was published in the Federal Register, March 2, 1992.

In this case, the notice was not returned to EPA as undeliverable, and delivery was not refused. The return receipt on its face shows that delivery was accomplished on March 13, 1992 at Respondent's correct address of record. The return receipt was signed by someone at that address, although the signature is illegible. The signed return receipt, in effect, creates a presumption that the notice was delivered as shown on the receipt.

The Respondent submitted the affidavit of Richard A. Perotti, Respondent's Director of Regulatory Affairs, concerning his investigation of this matter. The affidavit only shows that over a year later, nobody in Respondent's mail room claimed any knowledge or recollection of having received the EPA cancellation notice. Assuming its truth, and apart from its obvious shortcomings, [1] the Perotti affidavit does not raise any genuine issue of material fact that could rebut the presumption of delivery. If none of Respondent's employees could explain the return receipt in 1993, there is no reason to believe they could shed any light on the facts in a hearing in 1997. The only factual conclusion that can be drawn from this evidence is that the notice was delivered and then lost or mishandled by Respondent.

Even if Respondent had raised a genuine factual issue concerning whether the notice was actually delivered, it still could not show that the EPA failed to comply with FIFRA §6(f)(2). This is because EPA made reasonable efforts to deliver the notice. Even where efforts to give personal notice are unsuccessful, they may be sufficient to satisfy notice requirements. Here, EPA's certified mail method was reasonable, and EPA had no way of knowing, based on the return receipt showing delivery, that Respondent may not have received actual notice.

The Supreme Court has addressed the issue of proper notice and fundamental fairness in the delivery of notice of legal process by government agencies.

Notice must serve notions of fundamental fairness. *Matthews v. Eldridge*, 424 U.S. 319 (1976) . The means employed to deliver notice must show a reasonable and diligent effort to accomplish service. Where customary forms of service are impracticable, the alternative means chosen must not be substantially less likely to complete delivery. *Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 315 (1950). The courts have repeatedly recognized that the massive amounts of complex and specialized litigation undertaken by administrative agencies require that due process be meted out in terms that are fair, feasible and efficient. *Harborlite Corp. v. I.C.C.,* 613 F.2d 1088, 1092 (D.C. Cir., 1979).

The burden on the Internal Revenue Service to issue tax deficiency notices is analogous to the issue at hand, and illustrates the rationale for requiring service by certified mail. The deficiency notice procedure set forth in the Internal Revenue Code, Section 6212 (a), does not require the taxpayer to actually receive the notice of deficiency. Instead, the Commissioner must show only that it sent a notice by registered or certified mail to the taxpayer's last known address. The statutory scheme provides a method of notification which insures that the vast majority of taxpayers will be informed that a tax deficiency has been determined against them without imposing on the Commissioner the virtually impossible task of proving that the notice actually has been received by the taxpayer. *Jones v. United States,* 889 F. 2d 1448 (5th Cir. 1989) . Congress, when it authorized service by registered (or certified) mail, did not intend to require actual receipt by the addressee of the letter. Rather, it permitted the use of a method of giving notice that would ordinarily result in such receipt. *Cohen v. United States,* 297 F.2d 760, 772 (9th Cir. 1962).

The requirement in FIFRA §6(f)(2) has the same purpose as that in the Internal Revenue Code. The agency must send the notice of intent to cancel to the registrant's address on file with the Administrator.

The delivery by certified mail, return receipt requested is *per se* reasonable under the statute where the receipt is returned, showing delivery was accomplished, as in this case. There is nothing else Complainant could reasonably have done. Under FIFRA, there is the added protection of requiring publication of the notice in the Federal Register.

With regard to the personal service of an EPA complaint, the Environmental Appeals Board has stated: "Delivery, which contemplates personal service, is much more within the control of the Complainant. When serving a complaint by

mail, Complainant has control over how the mail is addressed but none whatsoever over who receives and signs for it on behalf of the Respondent." *In re Medzam, Ltd.*, 4 EAD 87, 93 (FIFRA Appeal No. 91-1; Final Decision, July 20, 1992). In the case at bar, the notice of intent to cancel was required to be sent to the registrant's address of record on file with the Administrator. The Respondent has not claimed that the address shown on the return receipt is incorrect.

In *In re Katzson Brothers, Inc.,* 2 EAD 134 (FIFRA Appeal No. 85-2; Order on Reconsideration, March 3, 1986), service of a complaint by certified mail addressed to the owner and president of a company, signed for by that person's secretary, was found to be valid despite allegations by the owner of lack of actual notice. The Chief Judicial Officer explained the policy considerations as follows:

"EPA is not accountable for Respondent's internal policies which allowed employees..... to sign receipts for mail properly addressed to Respondent's registered agent . . .EPA's rules of service of the complaint were fully complied with in this instance. Notions of fundamental fairness do not impose a duty on EPA to look behind a corporation's doors to ensure that its chosen methods of mail distribution guarantee receipt by the individual addressee. A corporation, and its registered agent, on the other hand, have a duty to ensure that properly addressed certified mail is correctly processed." 2 EAD 134, 136.

In this case as well, EPA fully complied with the service requirements for a notice of intent to cancel set forth in FIFRA §6(f)(2) and 40 CFR §154.33(c). The notice was sent by certified mail, return receipt requested, to Respondent's address of record. EPA has no duty to ensure that a duly authorized person signs the receipt with a legible signature and transmits it to the proper corporate managers. Those responsibilities are within the sole control of the Respondent.

Respondent contends that EPA's delivery efforts were not reasonable because EPA used a variation from the official U.S. Postal Service certified mail form. These arguments, however, only amount to an insubstantial smokescreen. The EPA forms were approved by the Post Office, and any other discrepancies alleged by Respondent were not shown to have any possible effect on the efficacy of EPA's mailing system.

EPA submitted the affidavits of Kathleen A. Martin and Jack Housenger that explained the procedure followed in sending notice of intent to cancel the EBDC

registrations. The basic process was a simple one. The EPA obtained a list of all pesticide registrants whose products contained EBDC. The notices of intent to cancel were sent, and checked off as received when the receipts were returned. (Martin affidavits) Ms. Martin did not apparently check the signatures of the addressees on the return receipts for legibility, but doing so was not required. As discussed above, Respondent was responsible for ensuring that its mail was received and handled properly.

The EPA used a preprinted bulk mailing envelope with the legend "Certified Mail - Return Receipt Requested" clearly printed in large type, above the return receipt form, Postal Service Form 3811. EPA asserts this rendered it unnecessary to check the box on Form 3811 in Item 4b for certified mail, or to use Form 3800 envelopes. The Post Office approved the envelopes in 1986, and was considering an unrelated revision to the envelopes in 1992 (Exhibits 1 and 2 attached to Affidavit of Linda G. Moore, with Complainant's Reply). The record establishes that the EPA's procedure was substantially equivalent to the Post Office technical requirements, that it was approved by the Post Office, and that it was fully effective as a certified mail procedure.

The Respondent also claims that EPA did not use the standard Post Office numbering system (a "P" followed by nine digits) in the Box 4 for the article number on Form 3811. EPA instead used its own six-digit numbers, based on the pesticide ingredients. Again, however, there is no showing that this variation by EPA affected the mailing's effectiveness in any way. As shown by the return receipts attached to the second affidavit of Kathleen A. Martin, the notices of intent to cancel reached their addressed destinations, including the notice sent to Grace-Sierra. The fact that EPA's internal numbering system has apparent duplications does not affect the fact that the mail was sent and received, as shown by the returned receipt. Any departures by EPA from standard Post Office procedures were not shown to have any possible effect on the actual delivery of the mail, and therefore do not render EPA's certified mail system "unreasonable."

EPA made reasonable efforts to accomplish delivery of the notice of intent to cancel, as required by FIFRA §6(f) (2), and Respondent has raised no other issue that could bar its liability for the alleged violations. Therefore, Complainant's motion for accelerated decision on liability is granted, and Respondent's motion to dismiss the charges is denied. This decision renders it unnecessary to decide whether Federal Register publication alone, without reasonable efforts to deliver the notice to Respondent, could satisfy the requirements of FIFRA §6(f)(2). The facts and circumstances surrounding

Respondent's actual knowledge of the notice, may, however be considered in relation to the proposed penalty in this matter, pursuant to FIFRA §14(a)(4).

FIFRA §6 (b) (2) , provides that Notice of Intent to Cancel becomes final and effective 30 days after the registrant's receipt of the notice, or publication in the Federal Register, whichever occurs later. In this case, the later date, based on receipt of the notice on March 13, 1992 may be used. Therefore, Respondent's EBDC products were deemed canceled on April 13, 1992.

Conclusion

By this decision, Respondent is found liable for 157 violations of selling an unregistered pesticide under Section 12(a)(1)(A), 7 U.S.C. 136j(a)(1)(A), and for violating a cancellation order under Section 12(a)(2)(K), 7 U.S.C. 136j(a)(2)(K), as alleged in the Complaint. The appropriate amount of the civil penalty remains at issue and will be resolved at hearing.

Further Proceedings

Complainant has filed a motion for an order to hold a "status conference." No conference as such will be held; rather the parties will be directed to fulfill the purposes of a prehearing conference by means of written prehearing exchanges, as authorized by 40 CFR §22.19(e). A separate order setting forth the prehearing procedures and schedule will be issued shortly.

Order

1. The Complainant's Motion for Accelerated Decision is granted on the issue of liability.

2. Respondent's Motion for a Decision to Dismiss this proceeding is denied.

Andrew S. Pearlstein
Administrative Law Judge

Dated: February 11, 1997
Washington, D.C.

In the Matter of Scott-Sierra Crop Protection Company, Respondent

Docket No. FIFRA-09-0864-C-95-03

CERTIFICATE OF SERVICE

I certify that a true copy of **Order granting Motion For Accelerated Decision On Liability,** dated February 11, 1997, was sent this day in the following manner to the addressees listed below:

Original by Regular Mail to:

Steven Armsey
Regional Hearing Clerk
U.S. EPA
75 Hawthorne Street
San Francisco, CA 94105

Copy by Regular Mail to:

Attorney for Complainant:

David M. Jones, Esquire
Assistant Regional Counsel
U.S.EPA
75 Hawthorne Street
San Francisco, CA 94105

Attorney for Respondent:

J. Brian Molloy, Esquire
Piper & Marbury, L.L.P.
1200 Nineteenth Street, NW
Washington, DC 20036

Maria Whiting
Legal Staff Assistant

Dated: February 11, 1997

[1] The affidavit consists mainly of hearsay and does not provide an adequate foundation concerning the mailroom personnel situation and mail handling practices in place on March 13, 1992, the date of the delivery.