

11/26/91



UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)
)
HAVEMAN GRAIN COMPANY, INC.) I.F. & R. Docket No. VII-1028C-90P
UNION, NEBRASKA)
)
Respondent)

Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136 et seq. When 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 be liable for all counts of the Complaint, and assessed the full amount of the penalty proposed in the Complaint.

ORDER ON DEFAULT

By: Thomas B. Yost
Administrative Law Judge

Dated: 12/26/91

APPEARANCES:

For Complainant:

Julie L. Murray
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

For Respondent:

Herbert J. Elworth, Esq.
P.O. Box 160
Plattsmouth, Nebraska 68048

INTRODUCTION

This civil proceeding for the assessment of a penalty was initiated by the U.S. Environmental Protection Agency (Complainant) pursuant to 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 June 12, 1990, charging Haveman Grain Company, Inc., (Respondent), with certain violations of the FIFRA and regulations promulgated thereunder. On or about June 29, 1990, Respondent filed an answer to the Complaint. The answer, in substance, explained the allegations in the Complaint, contested the amount of penalty sought, and requested a hearing. The Complaint charges Respondent with failure to maintain and make available for inspection all records required for a commercial application, in violation of 40 C.F.R. Section 171.11(c)(7)(i). A proposed civil penalty in the amount of Four Thousand Two Hundred Dollars (\$4,200) is sought.

FINDINGS OF FACT

Respondent is Haveman Grain Company, Inc., Laure Street, Box 175, Union, Nebraska 68455. On or about November 20, 1989, Complainant conducted an inspection of Respondent's facility located in Union, Nebraska. 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 and make available for inspection all records required for a commercial application

of PHOSTEK FUMIGATION TABLETS (EPA Registration Number 43743-1-1015), a restricted use pesticide. Respondent's records did not contain the address of the person for whom the pesticide was applied, location of the pesticide application, target pest(s), specific crop or commodity, as appropriate, and site, to which the pesticide was applied, time of application, trade name and EPA registration number of the pesticide applied, amount of the pesticide applied and percentage of active ingredient per unit of the pesticide used, and type and amount of pesticide disposed of, method of disposal, date(s) of disposal, and location of disposal site.

Following the issuance of the Complaint, the matter was assigned to the undersigned Administrative Law Judge (ALJ) on July 10, 1990. By order dated July 29, 1991, 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 August 19, 1991. The ALJ received a timely filing of Complainant's prehearing exchange. Respondent failed to submit its prehearing exchange by the August 19, 1991, deadline, and Respondent remains silent to this day. On October 29, 1991, the undersigned ALJ issued an order directing Complainant to prepare a Default Order for the ALJ's signature.

PROPOSED CIVIL PENALTY

Section 14(a)(1) of FIFRA provides for the assessment of a civil penalty of not more than Five Thousand Dollars (\$5,000) for

each violation against any commercial applicator who violates any provision of said Act. Complainant seeks a civil penalty assessment in the amount of Four Thousand Two Hundred Dollars (\$4,200) against Respondent.

The proposed civil penalty was calculated in accordance with the Environmental Protection Agency Guidelines for Assessment of Civil Penalties under the Act, 39 Fed. Reg. 27711 et seq. (July 31, 1974), and the Interim Revised Civil Penalty Matrix Pursuant to 1978 FIFRA Amendments. For the purposes of this penalty calculation, Complainant determined Respondent's size of business as having gross annual sales in excess of One Million Dollars (\$1,000,000) per year. This would place Respondent in Category V. As of this date, the Respondent has failed to provide to Complainant any financial information which would indicate another category is appropriate.

The Complaint at issue in this matter alleges Respondent failed to maintain and make available for inspection all records required for a commercial application of a restricted use pesticide, in violation of 40 C.F.R. Part 171.11(c)(7)(i). The proposed civil penalty for this violation according to the Guidelines for Assessment of Civil Penalties and the Interim Penalty Guidelines, for a Category V Respondent, is Four Thousand Two Hundred Dollars (\$4,200).

The Interim Penalty Guidelines also dictate that failure to maintain any of the required restricted use pesticide records, and "partial" recordkeeping violations following a warning,

should result in assessment of a civil penalty. Respondent had previously received a warning citation for a FIFRA recordkeeping violation noted during a March 10, 1988, inspection of its facility.

CONCLUSIONS OF LAW

Pursuant to Section 14(a) 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"

The pertinent regulation, 40 C.F.R. § 171.11(c)(7)(i), requires 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 as appropriate, and site, to which the pesticide was applied; year, month, day and time of application; trade name and EPA registration number of the pesticide applied; amount of the pesticide 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 failed to maintain and make available for inspection all records required for a commercial application of a restricted use pesticide. Complainant has established a prima facie case to support the allegation in the Complaint that Respondent violated 40 C.F.R. § 171.11(c)(7)(i), 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 by Respondent of all the facts alleged in the Complaint and a waiver of its right to a hearing regarding these factual allegations. 40 C.F.R. § 22.17(a).

ULTIMATE CONCLUSION

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

ORDER¹

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

1. Respondent, Haveman Grain Company, Inc., be assessed a civil penalty of \$4,200;
2. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to

¹ 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, the Initial Decision shall become the final order of the Administrator. 40 C.F.R. § 22.27(c).

the Treasurer of the United States of America, to the following address within sixty (60) days of the entry of this decision and order:

Mellon Bank
EPA - Region VII
Regional Hearing Clerk
P.O. 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.



Thomas B. Yost
Administrative Law Judge

Dated: 11/26/91

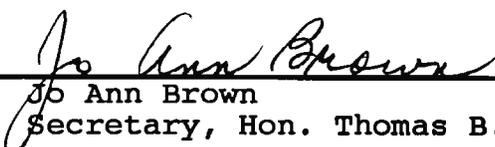
CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR § 22.27(a), I have this date forwarded via certified mail, return-receipt requested, the Original of the foregoing ORDER ON DEFAULT of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Venessa R. Cobbs, Regional Hearing Clerk, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said ORDER ON DEFAULT to all parties, she shall forward the original, along with the record of the proceeding to:

Hearing Clerk (A-110)
EPA Headquarters
Washington, D.C. 20460

who shall forward a copy of said ORDER ON DEFAULT to the Administrator.

Dated: 11/26/91


Jo Ann Brown
Secretary, Hon. Thomas B. Yost

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

IN THE MATTER OF)
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HAVEMAN GRAIN COMPANY, INC.) Docket No. I.F.&R. VII-1028C-90P
UNION, NEBRASKA)
) CERTIFICATION OF SERVICE
Respondent)
_____)

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties... (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Order on Default issued by the Honorable Thomas B. Yost along with the entire record of this proceeding has been served on Ms. Bessie Hammel, Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S. W., Washington, D.C. 20460; that a copy was hand-delivered to Counsel for Complainant, Julie L. Murray, Assistant Regional Counsel, Office of Regional Counsel, Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas; and that a copy was served by certified mail, return receipt requested on Counsel for Respondent, Herbert J. Elworth, Esq., P.O. Box 160, Plattsmouth, Nebraska 68048.

If no appeals are made (within 20 days after service of this Order on Default, and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. Section 22.27(c), and Section 22.30).

Dated in Kansas City, Kansas this 5th day of December, 1991.

Venessa R. Cobbs
Venessa R. Cobbs
Regional Hearing Clerk

cc: Thomas B. Yost
Administrative Law Judge
U. S. Environmental Protection
Agency
345 Courtland Street, N.W.
Atlanta, Georgia 30365