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REGION VII

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	Docket No. I.F.& R. VII-538C-84P
NELSEN RECYCLE, INC.,	)	
Respondent	)	

1. Federal Insecticide, Fungicide and Rodenticide Act -

Upon its failure to comply with a prehearing order of the Presiding Officer, Respondent was found to be in default, and thus admitted the charges in the Complaint filed against it and was liable for the penalty proposed in said Complaint.

2. Federal Insecticide, Fungicide and Rodenticide Act -

Respondent, because of its admitted failure to prepare and file its annual report with the U.S. Environmental Protection Agency Regional Office on or before February 1, 1984, in accordance with 40 CFR 167.5(c), and to furnish the information required by 40 CFR 167.5(a), violated said regulation and Section 7 of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 USC 136e.

3. Federal Insecticide, Fungicide and Rodenticide Act -

Section 12(a)(2)(L) of FIFRA, 7 USC 136j(a)(2)(L), provides that it is unlawful for any person who is a pesticide producer to violate any of the provisions of Section 7 of FIFRA.

Appearances

For the Complainant: Rupert G. Thomas, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
324 East 11th Street
Kansas City, Missouri 64106

INITIAL DECISION

On March 23, 1984, Complainant, U.S. Environmental Protection Agency (hereinafter "EPA"), filed subject Complaint herein charging the Respondent, Nelsen Recycle, Inc. (hereinafter "Respondent" or "Nelsen") with failure to comply with the provisions of Section 7 of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or "the Act") which requires any producer operating a registered pesticide-producing establishment to annually inform the EPA of the types and amounts of pesticides which it is currently producing, which he has produced during the past year and of all amounts which it has sold or distributed during the preceding year. Said Section 7 of the Act, and 40 CFR 167.5, the regulation promulgated pursuant to the Act, require that said annual report, containing the aforesaid information, shall be submitted by February 1 of each year. For said violation, Complainant proposes the assessment of a civil penalty in the sum of $3200.

Respondent, a Kansas Corporation, by its Vice President, Diana Nelsen, filed its Answer in letter form and acknowledged receipt of said Complaint, which was forwarded via Certified Mail by the Regional Hearing Clerk, U.S. EPA, Region VII, to and received by Respondent's Registered Agent, K.C. Ted Nelsen, Jr., at 1014 23rd Street, Belleville, Kansas. The Answer filed by Respondent was dated April 2, 1984. Said Agent signed a returned receipt form, also dated April 2, 1984, acknowledging receipt by him of subject Complaint. Respondent in its Answer admitted the charges contained in said

Complaint and asked that Nelsen Recycle, Inc., not be penalized "for not returning the form" which purportedly had been then belatedly signed and returned with Respondent's Answer.

On May 11, 1984, the undersigned Administrative Law Judge (ALJ) was designated to preside in the proceedings herein pursuant to Title 40 CFR 22.21(a). The parties were advised by letter, dated May 16, 1984, of said ALJ's designation and were ordered to advise if said case had been settled; and were further directed, if no settlement was agreed upon, to place in the mail to the other party, the Regional Hearing Clerk, and the ALJ, the names of all witnesses which each said party would call at the hearing, along with a brief narrative summary of the expected testimony of each such witness. In addition, each party was directed to advise what exhibits would be identified or offered at the hearing. Said letter and subsequent correspondence was sent by Certified Mail. Said "designation letter" was opened, after receipt by Respondent, and returned marked "Unclaimed." Succeeding correspondence to Respondent and its Registered Agent was not opened and was returned marked "Unclaimed." Respondent has failed and refused to submit the prehearing information as directed by said letter of ALJ, dated May 16, 1984.

Title 40 CFR §22.17(a) states, in pertinent part:

> "A party may be found to be in default (1) after motion, upon a failure to file a timely Answer to the complaint; (2) <u>after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer</u>; or (3) after motion or sua sponte, upon failure to appear at a conference or hearing without good cause being shown." (Emphasis supplied.)

By its Motion, dated and filed August 3, 1984, Complainant urges that Respondent be found in default.

I find that Respondent is in default in that it has failed and refused to comply with the Prehearing Order issued herein on May 16, 1984. Said order required that Respondent forward said information to the other party, the Regional Hearing Clerk and me on or before June 12, 1984. By its failure and refusal to comply with said directive, Respondent is subject to the said sanctions of 40 CFR 22.17(a), supra. For the purpose of this action, and this action only, Respondent is deemed to have admitted the facts alleged in said Complaint and has waived its right to a hearing on such factual allegations (40 CFR 22.17).

On the basis of the foregoing, I find that Respondent failed to file the annual report for pesticide-producing establishments with the U.S. EPA, Region VII, on or before February 1, 1984, as required by §12(a)(2)L of the Act, 7 USC 136j(a)(2)(L) and 40 CFR 167.5.

Section 14 of the Act authorizes the assessment of a civil penalty of not more than $5,000 for such violation. I find that a civil penalty in the sum of $3200, as proposed by subject Complaint, for the violation found herein is appropriate and accords with the law and regulations pertinent hereto.

In the premises, the following Final Order is hereby proposed:

PROPOSED FINAL ORDER 1/

1. Pursuant to FIFRA §14(a) (7 USC 1361(a)), as amended, a civil penalty of $3200 is assessed against Respondent, Nelsen Recycle, Inc., for violation of FIFRA §12(a)(2)(G) (7 USC 136j(a)(2)(G)), as amended.

2. Payment of $3200, the civil penalty assessed, shall be made within sixty (60) days after receipt of the Final Order by forwarding to the Regional Hearing Clerk, U.S. EPA, Region VII, a cashier's check or certified check, made payable to the Treasurer, United States of America.

DATED: August 8, 1984

Marvin E. Jones
Administrative Law Judge

1/ 40 CFR 22.27(c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless an appeal is taken by one of the parties herein or the Administrator elects to review the Initial Decision.

Section 22.30(a) provides for appeal herefrom within 20 days.

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 C.F.R. 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, the Original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATED: August 8, 1984

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ

IN THE MATTER OF)
)
Nelsen Recycle, Inc.,) Docket No. I. F. & R. VII-538C-84P
)
Respondent) CERTIFICATION OF SERVICE

84 AUG 13 P 4:

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 Initial Decision issued by Honorable Marvin E. Jones along with the entire record of this proceeding was served on the Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by certified mail, return receipt requested; that a copy was hand-delivered to Counsel for Complainant, Rupert G. Thomas, Office of Regional Counsel, Environmental Protection Agency, Region 7, 324 E. 11th Street, Kansas City, Missouri; that a copy was served by certified mail, return receipt requested on Respondent's attorney, Mr. K. C. Ted Nelsen, Nelsen Recycle, Inc., Route 1, Belleville, Kansas 66935.

If no appeals are made (within 20 days after service of this Decision), 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, Missouri this 8th day of August 1984.

Diana G. Reid

Diana G. Reid
Regional Hearing Clerk

cc: Honorable Marvin E. Jones
Administrative Law Judge
U. S. Environmental Protection Agency
324 East 11th Street
Kansas City, Missouri 64016