UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

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BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
| | ) | |
| Arab Termite and Pest Control of Charlestown, Indiana, Inc., | ) | Docket No. IF&R-V-112-P |
| | ) | |
| | ) | |
| Respondent | ) | |

Federal Insecticide, Fungicide and Rodenticide Act. Application of a registered pesticide for a use inconsistent with its labeling is a violation of Section 12(a)(2)(G).

Appearances:

Mr. Elwood C. Duncan, Sr.
Arab Termite and Pest Control, Inc.
338 Highway 160
Charlestown, Indiana 47111

Counsel for Respondent

James M. Thunder, Esquire
Office of Regional Counsel
U. S. EPA, Region V
230 So. Dearborn St.
Chicago, IL 60604

Counsel for Complainant

## ACCELERATED DECISION[1/]

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA), Section 14(a)(1), 7 U.S.C. 136 l(a)(1) for assessment of a civil penalty for alleged violations of the Act.[2/]

Complaint was issued by the Environmental Protection Agency (EPA/Complainant) Region V, against Arab Termite and Pest Control of Charlestown, Indiana, Inc. (Respondent) on August 25, 1983, charging Respondent with using the pesticide Union Carbide Carbaryl Insecticide to treat the attic of a residence of Mrs. Melvin Eversoll, Sellersburg, Indiana for carpenter ant control when the pesticide is not registered for residential use and the label did not have directions for such use.

Section 12(a)(2)(G) of FIFRA, 7 U.S.C. §136 j(a)(2)(G), states that it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling and the Complaint states that to treat an attic in a residential dwelling constitutes a violation thereof.

An initial civil penalty of $1,250.00 was proposed which amount, upon recalculation, was reduced to $700.00. Respondent, upon filing its Answer, was represented by counsel who later withdrew. Elwood C. Duncan, Sr. (owner)

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1/ This Accelerated Decision constitutes an Initial Decision. 40 CFR 22.20(b).

2/ FIFRA, Section 14(a)(1) provides, as follows:

> Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

continued to represent himself (pro se) and Arab Termite and Pest Control. Respondent's Answer contained only general denial and did not specifically address each item required by the Consolidated Rules of Practice 40 CFR 22.15(b). Respondent's response to the Court's Prehearing Order was not filed in a timely manner and did not respond to all prehearing discovery required by that Order.

Under date of May 21, 1985, Complainant filed Motion For An Accelerated Decision In Favor Of Complainant pursuant to 40 CFR 22.20. An Accelerated Decision may also be rendered sua sponte in favor of either party without hearing ". . .if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law." Said motion is hereby granted.[3/]

There is no dispute in the fact that Respondent applied a pesticide in the attic of the Eversoll residence and that the pesticide used was a "Sevin" dust. The evidence showing that Sevin-50 was applied is clear and convincing.

Neither Elwood Duncan, Sr., nor Elwood Duncan, Jr. were witnesses to the application. The Respondent states that Mr. Phillip Winters applied the pesticide. The owner of the residence, Mrs. Melvin Eversoll, concurs that neither Elwood Duncan, Sr., nor Elwood Duncan, Jr. were present at the time of the application of the pesticide.

The only substance sampled by the Office of the Indiana State Chemist was the pesticide applied by the Respondent. The owner of the residence, Mrs. Melvin Eversoll, states that she personally never applied any Seven Dust inside her house, that she had never employed any company other than the Respondent to apply pesticide to her residence prior to the April 13, 1982

3/ The elements required for issuance of a Default Order under 40 CFR 22.17 are also present in this proceeding.

inspection by the Office of the Indiana State Chemist, and that the Respondent applied a pesticide in her attic which constituted a "white dust" and that it was applied "all over the attic and [her] things in the attic."

It was this dust which the Office of the Indiana State Chemist sampled on April 13, 1982. Exhibit No. 8 (Affidavit of David E. Scott.)[4/]

This dust which was sampled contained approximately 50% carbaryl which corresponds to Sevin-50, Exhibit No. 8 and Exhibit No. 9 (Affidavit of Dr. Rodney J. Noel, and not to Seven-5 or Sevin-10, Exhibit No. 4 (Affidavit of John Love.)

Thus, the evidence in this proceeding demonstrates that there is no genuine issue of material fact on the issue of whether the pesticide applied by the Respondent on September 15, 1980, in the attic of Mrs. Melvin Eversoll, was Sevin-50 Dust, a registered pesticide.

There is no genuine issue of material fact as to whether said application was consistent with the labeling. The owner of the residence, Mrs. Melvin Eversoll, states that the dust immediately after the September 15, 1980 application was "all over the attic and [her] things in the attic." Exhibit No. 7 (Affidavit of Mrs. Melvin Eversoll.) The investigator for the Office of the Indiana State Chemist found the same condition on April 13, 1982, namely, "a light-colored dust or powder residue covering most of the exposed attic surfaces and contents." Between the 1980 application and the

4/ All exhibits referred to herein are those submitted with Complainant's Motion For Accelerated Decision, a list of which is attached.

1982 inspection, the attic had not been cleaned because of litigation.

FIFRA defines "to use any registered pesticide in a manner inconsistent with labeling" to mean the use of any registered pesticide in a manner not permitted by the labeling. 7 U.S.C. §136(ee). The definition contains exceptions but none of them apply in this case.

The labeling for Sevin-50 does not permit any residential indoor use. Exhibit No. 4 (Affidavit of John Love). Therefore, the Respondent's broadcast application in a residence was clearly inconsistent with the pesticide's labeling.

Assuming arguendo, that Sevein-10 was applied as contended by Respondent, the labeling of Sevin-10 did not permit indoor, broadcast residential use. (Exhibit 4)

In conclusion, there are no genuine issues as to material facts in this proceeding. The Complainant has offered unrebutted evidence which fully supports each of the elements of a violation of Section 12(a)(2)(G) of FIFRA and is, therefore, entitled to judgment as a matter of law.

## Findings Of Fact

1. Respondent is a corporation organized under the laws of the State of Indiana.

2. Respondent is a person as defined in Section 2(s) of FIFRA, (7 U.S.C. 136(s)).

3. Respondent, in the normal course of its business, applied a pesticide in the attic of a residential dwelling in Sellersburg, Indiana.

4. This pesticide was sampled by the Office of the Indiana State Chemist and was found to contain approximately 50% carbaryl which is the chemical content of Sevin-50, a registered pesticide.

5. The labeling for Sevin-50 does not permit any residential indoor use.

6. The application of Sevin-50 in the attic of the Eversoll residence was inconsistent with the uses permitted on the label (see Exhibit 4 and labels attached thereto), and a violation of Section 12(a)(2)(G) of FIFRA.

## Conclusion

The facts discussed, supra, require the conclusion that Respondent has violated FIFRA and is subject to the assessment of a civil penalty. The penalty proposed was $1,250.00 and is the result of placing Respondent in Category II ($100,000 to $400,000) of the Guidelines For Assessment of Civil Penalties, and as to environmental harm "adverse effects are highly probable." However, Complainant agrees as does this Court that the record is void of any showing to this effect and that the adverse effects are "unknown," which serves to reduce the penalty to $700.00.

## ORDER[5/]

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a)(1), 7 U.S.C. 136 l(a)(1), a civil penalty of $700.00 is assessed against Arab Termite and Pest Control of Charlestown, Indiana, Inc. for violation of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the Final Order upon Respondent by forwarding to the Regional Hearing Clerk, P. O. Box 70753, Chicago, IL 60673, a cashier's check or certified check payable to the Treasurer, United States of America.

Edward B. Finch
Chief Administrative Law Judge

Dated: August 16, 1985
Washington, D. C.

5/ Unless an appeal is taken pursuant to the rules of practice, 40 CFR 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. See 40 CFR 22.27(c).

CERTIFICATE OF SERVICE

I hereby certify that the original of this Accelerated Decision was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and three copies were mailed by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region V, for distribution pursuant to 40 CFR 22.27(a).

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: August 16, 1985

LIST OF EXHIBITS

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| No. 1 | Respondent's Answer of September 15, 1983 |
| No. 2 | Respondent's Pre-Hearing Exchange received January 10, 1985 with Exhibits |
| No. 3 | Exhibit No. 2 to Complainant's Pre-Hearing Exchange: Letter of December 1, 1981, from Mr. Scott to Mr. Duncan |
| No. 4 | Affidavit of John Love |
| No. 5 | Exhibit No. 4 to Complainant's Pre-Hearing Exchange: Letter of December 29, 1981, from Mr. Duncan to Mr. Scott |
| No. 6 | Exhibit No. 3 to Complainant's Pre-Hearing Exchange: Letter of December 8, 1981, from Mr. Scott to Mr. Duncan |
| No. 7 | Affidavit of Mrs. Melvin Eversoll |
| No. 8 | Affidavit of David E. Scott |
| No. 9 | Affidavit of Dr. Rodney J. Noel |
| No. 10 | Exhibit No. 7 to Complainant's Pre-Hearing Exchange: "Civil Penalties Under the Federal Insecticide, Fungicide, and Rodenticide Act, As Amended," 39 Fed. Reg. 27711 (July 31, 1974) |
| No. 11 | Report of Dun & Bradstreet |