UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

ENVIRONMENTAL PROTECTION AGENCY Complainant v. STREETER FLYING SERVICE, INC. Respondent	)	Docket No. IF&R VII-612C-85P

1. Federal Insecticide, Fungicide and Rodenticide Act, as amended. 7 U.S.C. § 136 et seq. (Act). Where affidavits or other documentary evidence clearly establish that the respondent violated 7 U.S.C. § 136j(a)(2)(G) for using a pesticide inconsistent with its labeling, an accelerated decision, pursuant to 40 C.F.R. § 22.20, finding respondent in violation of the aforementioned section of the Act will issue as to all or any part of the proceeding, as there is no issue of material fact relating to the violation which required a hearing.

2. Penalty Assessment under the Act. Concerning the amount of the proposed penalty, the respondent has the burden of submitting financial information indicating the adverse effect of the proposed penalty upon its ability to continue in business. Such information if bona fide shall be considered, if submitted. (Penalty Guidelines, 39 Fed. Reg. 27711, 17712; July 31, 1974)

APPEARANCES:

For Complainant:
Henry F. Rompage, Esquire
Office of Regional Counsel
U. S. Environmental Protection Agency
Region VII
762 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent:
Stephen R. Streeter, pro se
Owner - Operator
Streeter Flying Service, Inc.
P.O. Box 155
Bloomfield, Iowa 52537

ACCELERATED DECISION AND ORDER

Introduction

This proceeding was commenced by issuance of a Complaint and Notice of Opportunity for Hearing (complaint) on December 24, 1984 by Morris Kay, Regional Administrator, Region VII, U. S. Environmental Protection Agency (sometimes Agency or EPA), charging respondent, Streeter Flying Service, Inc., with violating the Federal Insecticide, Fungicide and Rodenticide Act as amended, 7 U.S.C. § 136 et seq. (Act). Specifically, respondent was said to violate 7 U.S.C. § 136j(a)(2)(G) which section of the Act pertains to using a pesticide in a manner inconsistent with its labeling. The proposed penalty sought to be assessed in the complainat was $500. On January 22, 1985, respondent served a two sentence answer to the complaint. Pursuant to orders of February 12 and March 21, 1985, the parties submitted their prehearing exchanges. On May 8, 1985, in accordance with 40 C.F.R. § 22.20, complainant served a motion for an accelerated decision. By order of May 17, 1985, respondent was directed to answer the motion. No written response was forthcoming from respondent. In a pleading of July 3, 1985, complainant submitted a proposed draft of an accelerated decision, copy to respondent by certified mail. To date, there has been no written submission from respondent.

An administrative civil complaint was filed previously against respondent on September 29, 1982, under IF&R Docket No.

VII-462C-82P. The complaint alleged misuse of the pesticide LORSBAN 4E INSECTICIDE through drift. The matter was settled when respondent entered into a consent agreement.

FINDINGS OF FACT

The record evidence shows that respondent is a corporation, with its principally place of business in Bloomfield, Iowa. It is engaged in the business of spraying crops by aircraft. The gross annual sales of respondent are in the range of $100,000 to $400,000.*

On or about June 21, 1983, respondent applied aerially a product designated as WEEDONE IBK WOODY PLANT HERBICIDE to rangeland in Moravia, Iowa, owned by Bill McEnery, and farmed by Tom Teno. On July 20, 1983, Richard Colwell, a pesticide investigator of the Iowa Department of Agriculture, pursuant to a complaint, obtained samples of vegitation from the pasture-land on the north that abutted the treated McEnery property. Colwell interviewed Teno. The latter stated that he retained the services of the respondent, who recommended what chemical was to be applied after Teno advised him that it was permanent pasture or rangeland. He also told respondent to choose a

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* This finding is based upon financial information received in settlement of in previous administrative complaint filed under the above mentioned Docket No. VII-462C-82P, in which respondent was placed in size-of-business Category II.

herbicide that was safe for cattle because his neighbors cattle had a tendency to break into the pasture. On August 2, 1983, Colwell went to the offices of the respondent. Streeter, the president of respondent was not there but he had advised his spouse and office manager to provide a copy of his spray records to Colwell.

The label of WEEDONE IBK WOODY PLANT HERBICIDE used in the spraying stated in pertinent part, ". . . contains butoxyethanol ester 2,4,5-T and 2,4-D. Controls woody plants on utility rights-of-way and along highways." Among the cautionary statements contained on the label were that the product was not to be used in a manner inconsistent with its labeling. The applicator was cautioned not to permit mist to drift onto desireable crop or ornamental plants which may be susceptible to 2,4-D and 2,4,5-T herbicides. Additionally, the label also warned that meat animals should not be grazed on treated land within two weeks of slaughter, and that dairy animals should not graze on the land within six weeks of application. Further, directions for use on the label stated clearly that the herbicide was not to be applied when weather conditions favored a drift from the treated area. The label bore the EPA Registration Number 264-21.

The vegitation samples were obtained by Colwell on July 20, 1983 from the pastureland, not to be sprayed, directly north of

the treated field. This land was the property of John Curran. These samples were analyzed and the following amounts of 2,4-D and 2,4,5-T were found:

a. Sample No. IA 1183 taken from an oak tree approximately 500 yards north of the treated land contained .50 parts per million (ppm) 2,4-D and 1.4 ppm 2,4,5-T.

b. Sample No. IA 1184 collected from a tree on the southwest corner of Curran pasture contained 1.9 ppm 2,4-D and 2.2 ppm 2,4,5-T.

c. Sample No. IA 1185 taken from a cottonwood tree 115 yards east of the southwest corner of the Curran pasture contained 3.3 ppm 2,4-D and 3.4 ppm 2,4,5-T.

d. Sample No. IA 1186 was from a tree 190 yards east of the southwest corner of the Curran pasture contained 1.8 ppm 2,4-D and 2.0 ppm 2,4,5-T.

e. Sample No. IA 1187 collected from a bush on a road adjacent to treated pasture contained 24 ppm 2,4-D and 18 ppm 2,4,5-T.

Respondent did not apply the WEEDONE IBK WOODY PLANT HERBICIDE in accordance with its labeling directions in that it was permitted to drift onto susceptible plants, and onto pasturelands that was used for cattle. In paragraph "4" of a letter dated May 1, 1985 (apparently an additional answer to complaint) "[R]espondent contends that the amount of penalty proposed in the complaint is inappropriate. The alleged drift

is the only valid charge." (emphasis supplied) This constitutes an admission by respondent to the finding that it permitted the drift of the herbicide contrary to labeling instructions.

CONCLUSIONS OF LAW

At the outset, the determination of whether or not the subject matter is amenable to an accelerated decision hinges upon an interpretation of the Consolidated Rules of Practice, 40 C.F.R. § 22.20 (Rule) and applicable law. The Rule provides in pertinent part, as follows:

> (a) General. The Presiding Officer, upon motion of any party . . . may . . . render an accelerated decision in favor of the complainant or respondent, as to all or any part of the proceeding, . . . if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . . . (emphasis supplied)

It is rooted in common sense that oral hearings are to be used for the resolution issues of material facts. The Rule, in part, exemplifies this.* The concept of an accelerated decision is similar to that of summary judgment, and not every factual issue is a bar. The existence of minor factual disputes would not preclude an accelerated decision. To have such an effect, the disputed issues must involve "material

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* See generally, 3 Davis, Administrative Law Treatise, § 12.2 2d Ed. 1980).

facts" or those which have legal probative force as to the controlling issue. Stated otherwise, a "material fact" is one that makes a difference in the litigation.* Genuine issues involving such facts are absent from this proceeding. Also to be considered is that it has been enunciated by the Supreme Court that only "some form of hearing" is required where property rights are involved, and that the requiring of an evidentiary judicial type hearing upon demand in all cases would entail fiscal and administrative burdens out of proportion to any countervailing benefits. Mathews v. Eldridge, 424 U.S. 319, 333, 347-349 (1976).

From the record in this matter, the essential facts necessary for resolution are not in contention. Stated otherwise, there is "no genuine issue of material fact." The central factual question in this proceeding is whether or not respondent used the herbicide in question in a manner inconsistsent with its labeling. The documentary evidence, including the respondent's admission, establishes this. The legal consequences flowing there from is one exclusively of law, and are adequately addressed in the record.

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* Words and Phrases, "Material Fact."

The appropriate section of the Act, 7 U.S.C. § 136j(a)(2)(G) provides that:

> . . . it shall be unlawful for any person . . . . to use any registered pesticide in a manner inconsistent with its labeling; . . .

The findings show that respondent used WEEDONE IBK WOODY PLANT HERBICIDE contrary to its labeling instructions in that it was applied to site not specified on the label and respondent permitted the herbicide to drift onto a pastureland for cattle. It is concluded that respondent violated 7 U.S.C. § 136j(a)(2)(G).

Penalty Amount

In determining the amount of penalty for a violation, the appropriate section of the Act, 7 U.S.C. § 136 l(4) provides, in pertinent part, ". . . the Administsrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation . . . ." The Agency's Guidelines for Civil Penalties under the Act, 39 Fed. Reg. 27111-27722 (July 31, 1974), expand upon and refine the factors mentioned in the Act. In significant part, the Guidelines provide that the gravity of violation is a function of the potential that the act committed has to injure man or the environment; the particular person's history of compliance of the Act; and evidence of good faith. The Guidelines provide

also that in determining the proposed penalty the size of the respondent's business should be considered, and the effect of the proposed penalty upon the ability of the respondent to continue in business. The burden is placed on the respondent to "submit financial information indicating the adverse effect of the proposed penalty to continue in business."

Turning first to the gravity of respondent's violation, it is observed initially that respondent had violated the Act previously. Additionally, the respondent has evidenced something less than good faith in the instant circumstances. It failed to respond in writing to the undersigned order of May 17, 1984, directing it to answer complainant's motion for an accelerated decision. Further, the acts of the respondent clearly injured the environment and had the potential to damage man because the pesticide was permitted to drift onto pastureland where cattle grazed. Concerning the other elements in the Guidelines, the size of the respondent's business has not been shown by it to be other than Category II, or that the payment of the proposed civil penalty will have an adverse effect on its ability to continue in business.

ULTIMATE CONCLUSION AND ORDER

Based upon the totality of credible record evidence, it is concluded that respondent violated 7 U.S.C. § 136j(a)(2)(G) and

that the condign penalty in this matter is $500, the amount proposed by complainant. IT IS ORDERED that this assessed penalty of $500 against respondent Streeter Flying Services, Inc. shall be paid by submitting a certified or cashier's check in this amount, payable to the Treasurer of the United States, and mailed to:

Mellon Box
EPA-Region 7
(Regional Hearing Clerk)
P.O. Box 360748M
Pittsburgh, PA 15251

Payment shall be made within 60 days of the receipt of this order.*

Frank W. Vanderheyden
Administrative Law Judge

DATED: August 27, 1985
Washington, D.C.

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* Unless appealed in accordance with 40 C.F.R. § 22.30, or unless the Administrator elects to review same sua sponte as provided therein, this decision shall become the final order of the Administrator in accordance with 40 C.F.R. § 22.27(c).