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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Harmack Grain Co., Inc.,	)	Docket No. IF&R VIII-150C
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act. Failure of Respondent to register as a dealer in restricted use pesticides prior to sale of such pesticides constitutes a violation of FIFRA and the regulations promulgated thereunder.

Appearances:

Mr. V. L. Sackett
Harmack Grain Co., Inc.
Box 8
Cope, Colorado 80812

Respondent

Teresa N. Lukas, Esquire
Office of Regional Counsel
U. S. EPA, Region VIII
999 18th Street
Denver, Colorado 80202-2413

Counsel for Complainant

ORDER GRANTING MOTION FOR
ACCELERATED DECISION AND ACCELERATED DECISION 1/

Complainant filed Motion For Accelerated Decision on April 16, 1986.

Respondent, by letter dated April 21, 1986, acknowledged receipt of this motion but did not comment thereon. Rather, Respondent countered with a Motion To Dismiss, which motion has been ruled upon this date, with a denial thereof.

As grounds for the motion, Complainant states that there are no genuine issues of material fact in this matter and that as a matter of law, the Environmental Protection Agency (EPA) is entitled to a judgment in its favor on the issue of Respondent's liability for the violations stated in the Complaint. Pursuant to a neutral inspection plan, an inspector from the Toxic Substances Branch of the EPA, Region VIII, undertook a dealer, marketplace and use inspection of Respondent's facility in Cope, Colorado on August 7, 1984.

As alleged in Paragraph 5 of the Complaint, the EPA inspector obtained evidence that Respondent had sold restricted use pesticides after the effective date of the EPA regulation requiring registration, but before registering with EPA as a restricted use pesticide dealer.

Subsequent to the inspection, EPA issued a Complaint and Notice of Opportunity for Hearing on March 11, 1985, alleging violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA) and its implementing

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

regulations. Respondent is alleged to have violated Section 4(a)(1) of FIFRA, 7 U.S.C. §136b(a)(1), which authorizes the Administrator of EPA to adopt regulations pertaining to the use and sale of restricted use pesticides in states where EPA conducts the applicator certification program. Respondent is alleged to have violated two such regulatory requirements: (1) 40 CFR §171.11(g)(1), which requires restricted use pesticide dealers to register with EPA by June 25, 1984, and (2) 40 CFR §171.11(c)(7), which requires applicators to keep complete records of each application of restricted use pesticides. This allegation (2) was subsequently deleted from the Complaint.

Respondent filed its Answer and Request for Hearing on June 4, 1985.

Findings of Fact

1. EPA has jurisdiction in this matter under Section 14(a) of FIFRA.

2. Respondent, Harmack Grain Co., Inc., is a "person" within the meaning of Section 2(s) of FIFRA, 7 U.S.C. §136a(s) and thus subject to regulations promulgated thereunder.

3. On August 7, 1984, Dan W. Bench, an authorized EPA inspector, conducted an inspection of Respondent's facility in Cope, Colorado.

4. Inspection of sales records revealed that Respondent had sold restricted use pesticides on July 18 and 30, 1984.

5. Respondent did not register with EPA as a restricted use pesticide dealer until after the inspection on August 10, 1984.

6. EPA regulations required all restricted use pesticide dealers in Colorado to register with EPA by June 25, 1984.

7. EPA mailed to Respondent a notification of the requirement in paragraph 6 above.

8. Respondent's failure to report its business name and address to the EPA Regional Office by that date constitutes a violation of the regulations and FIFRA §12(a)(2)(N) and §4(a)(1), 7 U.S.C. §136j(a)(2)(N) and §136b(a)(1), respectively.

Discussion

There is no genuine issue of material fact with regard to the charge that Respondent failed to register as a restricted use pesticide dealer. In the Answer, Respondent did not deny that it had failed to register with EPA before selling restricted use pesticides subsequent to the effective date of the regulation, June 25, 1984. Respondent merely denied that it had received notification from EPA of the new regulation. FIFRA and its regulations, however, impose strict liability on pesticide dealers and other persons. In order to establish a violation, it is not necessary to show that the violator had actual knowledge of statutory and regulatory requirements. In this case, actual knowledge of the registration violation is reflected in the FIFRA penalty policy.

In its Answer, Respondent also raises as a defense the notion that, because it was inspected, Respondent must already have been listed as a restricted use pesticide dealer by EPA. Respondent implies that such listing relieved Respondent of the duty to register. This argument has no merit. The list which was the source of the neutral inspection plan, and thus the basis for the inspection of Respondent's facility, was a list of licensed pesticide dealers -- many of which sell only general use pesticides -- supplied to EPA by the State of Colorado. Regardless of the source of the inspection plan, no list compiled by EPA or another government agency could exempt Respondent from its legal obligation to submit its name and business address to EPA as a restricted use pesticide dealer. Even Respondent does not believe it was so exempt, since it did submit the required information on August 10, 1984, two days after the EPA inspection.

In its prehearing exchange, Respondent again unsuccessfully raises the defense of prior registration with EPA by virtue of EPA's dealers list. Again, there is no merit to this claim. EPA's attorney did not waive the registration requirement in her conversation with Respondent's manager. Nor does the Notice of Inspection add any weight to Respondent's argument, since it shows only that EPA conducted an inspection and that certain probable violations were found as a consequence. Subsequent registration, while showing Respondent's willingness to redress the violation, does not excuse Respondent from timely compliance with FIFRA.

As a matter of law, Respondent's failure to register with EPA as a restricted use pesticide dealer is a violation of FIFRA and its regulations, and EPA is entitled to judgment in its favor as a matter of law.

Respondent asserts as one of its defenses that it did not receive the notice presumably forwarded to it by EPA.

While Complainant cannot and did not prove mailing and receipt by "certified mail, return receipt requested," the old adage is still true that if mail is delivered to the Postal Service, the presumption is that it was delivered.

The Proposed Civil Penalty

The original penalty was calculated in accordance with the policy and guidance set forth in the "Guidelines for Assessment of Section 14(a); Citation Charges for Violations," 39 F.R. 27711-27722, Wednesday, July 31, 1974.

Since the regulation in question, 40 CFR §171.11(g)(1) ("Pesticide Dealer Reporting Requirements"), was not promulgated until November 29, 1983, the Agency has not yet developed a penalty matrix for this regulation. Therefore, in determining the penalty for this violation, Complainant has analogized between Respondent's violation, failure to register as a restricted use pesticide dealer, and the penalty which would be assessed against a producer establishment that similarly failed to register with EPA. In assessing this penalty, Complainant used the charge code "E33" in the penalty guidelines, 39 F.R. 27711, 27718.

The schedule takes into account Respondent's business size, as measured by gross annual sales, as well as Respondent's knowledge of the registration requirement. With regard to business size, Complainant concluded that Respondent falls into Category V. This simply means that Respondent has more than one million dollars ($1,000,000.00) in annual gross sales. 39 F.R. 27711, 27712.

The initial assessment of $4,200 assumed that Respondent had knowledge of the registration requirement. Respondent then submitted a signed statement attesting that its management had no actual knowledge of the registration requirement. Therefore, Complainant's original Complaint was amended to reduce the penalty to $1,800 in accordance with the penalty guidelines.

Although Respondent showed good faith in complying with the registration requirement after Mr. Bench's inspection, it does have a history of FIFRA violations. Specifically, the Agency has sent warning letters to Respondent regarding the use of a restricted use pesticide inconsistent with its label (April, 1982), making a restricted use pesticide available to an uncertified person (June, 1983), and failure to maintain complete records of use of restricted use pesticides (October, 1983). It should be noted that the second warning letter was issued upon the withdrawal of a Complaint; in that letter, the Agency declared that the withdrawal was based solely on a determination not to assess a penalty. It is true that none of the three prior violations resulted in an admission or an adjudication of liability. However, the warning letters constitute the Agency's response to violations which are perceived to be significant.

Views On The Gravity Of The Violation

While the gravity of the violation may at first glance seem minor, it should be noted that the Federal Insecticide, Fungicide and Rodenticie Act is primarily a recordkeeping and reporting statute. EPA must keep track of chemicals which are placed on the market solely because of their toxicity to target species.

Accurate and timely reporting is necessary so that EPA may alert producers, dealers, and users of any "unreasonable adverse effects" to human health and the environment which a pesticide may be discovered to cause. Lax compliance with reporting dates creates uncertainty as to what pesticides are being produced, sold, and used by whom. This could cause substantial harm to human health and the environment should EPA need to stop the sale of a given pesticide on short notice.

Requiring dealers specifically to give notice that they are selling restricted use pesticides is necessary so that the Agency can conduct an efficient dealer inspection program and thereby determine whether hazardous pesticides are being made available only to competent users, i.e., to certified applicators. Unless it can pinpoint the subject pesticide dealers, EPA cannot effectively regulate the sale and use of these toxic substances.

Respondent has not raised the issues of inability to pay the penalty, or to pay the penalty and remain in business.

Conclusion

There is no question of the fact that Respondent violated FIFRA and that a penalty should be assessed. However, the Court believes that the assertions of Respondent that it did not receive the notice of requirement to register is sincere. For this reason, the requested penalty of $1,800 is hereby reduced to $900.00.

ORDER[2/]

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 $900 is assessed against Harmack Grain Co., Inc.; Cope, Colorado, 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 a cashier's check or certified check payable to the Treasurer, United States of America, to:

U. S. EPA, Region 8
(Regional Hearing Clerk)
P. O. Box 360859M
Pittsburgh, PA 15251

It is so ordered.

Edward B. Finch
Chief Administrative Law Judge

May 2, 1986

Washington, D. C.

2/ 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 Order Granting Motion For Accelerated Decision and 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 VIII, for distribution pursuant to 40 CFR 22.27(a).

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

May 2, 1986