

3/27/91

BEFORE THE
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

In Re:)
Beach-O-Rama Sales, Inc.,) Docket No. IF&R-04-907001-C
Respondent.)

Federal Insecticide, Fungicide and
Rodenticide Act (hereinafter FIFRA)

FIFRA:

1. Accelerated Decision - Where Respondent fails to file a response to a motion, Respondent shall be deemed to have waived any objection to the granting of the motion.

FIFRA:

2. Burden of Proof - Where EPA has no record of a report being filed, burden is on Respondent to show that report had been properly mailed to EPA.

FIFRA:

3. Burden of Proof - Proof that Respondent had completed and filed report in its office held insufficient to establish that a report had been properly mailed and was lost after it had been delivered to the EPA.

APPEARANCES:

For Complainant: Lynda D. Carney
Assistant Regional Counsel
U.S. Environmental Protection Agency, Region IV
345 Courtland Street, N.E.
Atlanta, Georgia 30365

For Respondent: Rita Rambler
Vice President
Beach-O-Rama Sales, Inc.
2017 Wilson Street
Hollywood, Florida 33020

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ACCELERATED DECISION

Complaint in this proceeding was issued by the Director, Air, Pesticides and Toxics Management Division, U.S. Environmental Protection Agency, Atlanta, Georgia 30365 on September 24, 1990, under the authority of Section 14(a) of FIFRA, 7 U.S.C. 136(l).¹ The Complaint alleged Respondent's failure to submit to the Administrator an annual report of pesticide production (hereinafter referred to as "Report") for the calendar year 1989, consisting of information on the types and amounts of pesticides produced and/or distributed by a registered establishment as required by Section 7(c) of FIFRA, 7 U.S.C. §136(c), and 40 C.F.R. §167.5(c) which is a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. §136(a)(2)(L).

Answer was timely filed in the form of an undated letter, received by Complainant on October 11, 1990. A copy of the Report was enclosed. The letter indicated that Respondent had filed the report, dated February 1, 1990, in its office. Although the letter denied the allegation in the Complaint, Respondent was unable to support its position that the annual report was submitted to Complainant.

Motion was made on November 14, 1990 to amend the Complaint to correct a citation to the incorrect penalty policy and form of Respondent's name. Neither proposed change affected the amount of

¹As used herein, "l" is an italicized lower case "L."

the proposed penalty. On December 20, 1990, the Complaint was amended a second time to clarify it still further and make it easier to read. Subsequently, on December 26, 1990, an Order was issued, granting Respondent twenty (20) days from December 20, 1990 to file an amended Answer. Respondent did not file an amended Answer in response to either Amended Complaint.

Complainant contends, and supports by affidavit, that Respondent's report was not received until Respondent's October 11, 1990 letter, which enclosed a copy of its 1989 pesticide production report, was filed.

Complainant filed a Motion for Accelerated Decision, dated January 25, 1991, pursuant to the Consolidated Rules of Practice, 40 C.F.R. §22.20(a), requesting a judgment in favor of Complainant in that no genuine issue of material fact exists and Complainant is entitled to judgment as a matter of law. I agree.

FINDINGS OF FACT

1. Beach-O-Rama Sales, Inc., hereinafter referred to as Respondent, is located in Hollywood, Florida.
2. Respondent is a "person" as defined by Section 2(s) of FIFRA, 7 U.S.C. §136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.
3. Respondent is a "producer" as defined in Section 2(w) of FIFRA, 7 U.S.C. §136(w), and 40 C.F.R. §167.1(d).
4. Respondent is registered under EPA Establishment Number 38225-FL-001.
5. Respondent failed to submit to the Administrator on or before February 1, 1990, its annual report consisting of

information on the types and amounts of pesticides produced and/or distributed by the registered establishment as required by Section 7(c) of FIFRA.

6. Respondent has violated Section 7(c) of FIFRA, 7 U.S.C. §136e(c) and 40 C.F.R. §167.5(c), which constitutes a violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. §136j(a)(2)(L).

7. Respondent's gross sales from all business revenues for 1989 were over \$1,000,000, placing Respondent in Category I of the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

DISCUSSION AND CONCLUSION

Although Exhibit 1, the Answer to the Complaint (an undated letter, from Respondent, received October 11, 1990), denies the allegation in the Complaint, Respondent has been unable to support its position that the annual report was submitted to Complainant.

Complainant contends Respondent's employee, who is "now handling the above mentioned duties," including "the completion and transmission of all government documents" as set forth in Exhibit 1, stated to Complainant that Respondent did not file the subject report. Respondent did not file a response to the allegation.

Even if the facts in Respondent's correspondence were as they are stated, Respondent has been unable to meet its burden of showing that the form was properly mailed. Complainant contends and shows by supporting affidavit, Exhibit 2, affidavit of Milo Otey, dated January 16, 1991, that Respondent did not send the annual report until October 11, 1990, when it was attached to the

Answer to the Complaint. Complainant contends that it has reviewed its records of incoming reports and had no record of receipt of Respondent's report prior to filing the subject Complaint. Chem-O-Lene Corp., EPA Docket Number FIFRA-09-0445-C-85-24 (1986), held that the burden of showing that the form was properly mailed is upon Respondent. The Chem-O-Lene Court found that it is insufficient to show that one's procedures for handling the mail infer that the report was in fact mailed. Chem-O-Lene Corp. at p. 5. It is therefore also insufficient to show that just because the report may have been "completed and filed in [Respondent's] office," Exhibit 1, that it was necessarily mailed to Complainant and that Complainant therefore received it. Respondent has stated that it has no documentation to verify Complainant's receipt of the report, nor that Respondent mailed the report. See Exhibit 1. Respondent contends the Report was filed in its office February 1, 1990.

The guidelines for assessment of civil penalties for a violation of FIFRA, as amended, are contained in a document entitled Enforcement Response Policy For The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (July 2, 1990), Exhibit 3, which is Complainant's Exhibit 7 and incorporated herein by reference. These guidelines establish a uniform system for penalty assessments for the various violations of FIFRA. The guidelines take into account the factors required to be considered by Section 14(a) of FIFRA, 7 U.S.C. 1361(a):

In determining the amount of the penalty, the Administrator 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.

As shown in Exhibit 4, Affidavit of Kenneth Clark, Southern Unit Chief of the Pesticides Section, incorporated herein by reference, the "size of business" and the "gravity of the violation" were both factors in determining the penalty amount. Since information concerning Respondent's size of business was not readily available, the proposed penalty was calculated using the Category I size of business, in accordance with the penalty guidelines at page 21. Respondent later verbally confirmed the appropriateness of this classification which includes businesses with yearly sales in excess of \$1,000,000.

According to the penalty matrix, the failure of a Category I business to submit yearly production data results in a penalty of \$5,000. The proposed penalty calculation in the Complaint is therefore correct.

Complainant contends that Respondent's reasons in Exhibit 1 for failing to file the annual report offer no substantive basis for reduction of the proposed penalty. Furthermore, the proposed penalty was established in accordance with the policy guidance and that the amount is fair and equitable. The penalty for this violation by a Company whose gross sales of all business operations are in excess of \$1,000,000 is \$5,000.

Therefore, it is my opinion that a penalty of \$5,000 is appropriate for Respondent's failure to comply with the filing requirements of FIFRA for 1989.

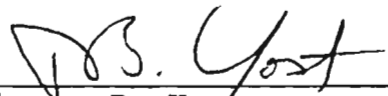
PROPOSED FINAL ORDER²

1. Pursuant to FIFRA §14(a), 7 U.S.C. §1361(a), as amended, a civil penalty of \$5,000 is assessed against Respondent Beach-O-Rama Sales, Inc., for violation of FIFRA §12(a)(2)(L), as amended.

2. Payment of \$5,000, the civil penalty assessed, shall be made in three installments, due in the following manner: \$1,000 shall be paid within 30 days after receipt of the Final Order. \$2,000 shall be paid within 90 days after receipt of the Final Order. \$2,000 shall be paid within 150 days after receipt of the Final Order. Payment shall be made by forwarding to the Regional Hearing Clerk, a cashier's check or certified check, made payable to the Treasurer, United States of America at the following address:

U.S. Environmental Protection Agency, Region IV
Regional Hearing Clerk
Post Office Box 100142
Atlanta, Georgia 30364

Dated: 3/27/91



Thomas B. Yost
Administrative Law Judge

²40 C.F.R. §22.27(c) provides that this Accelerated 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 Accelerated Decision.

40 C.F.R. §22.30(a) provides for appeal herefrom within 20 days.

CERTIFICATION OF SERVICE

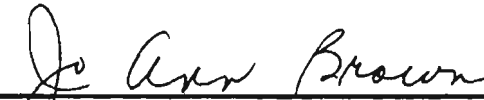
I hereby certify that, in accordance with 40 C.F.R. § 22.20, I have this date hand delivered, the Original of the foregoing **ACCELERATED DECISION** of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Julia Mooney, Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, NE, Atlanta, Georgia 30365, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said **ACCELERATED DECISION** 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 **ACCELERATED DECISION** to the Administrator.

Dated: _____

3/28/91



Jo Ann Brown
Secretary, Hon. Thomas B. Yost