7-21-92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Johnny Mrsny,	)	Docket No. I.F.& R.-VII-1047C-90P
	)	
	)	
Respondent	)	

O R D E R

The complaint in this proceeding under section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. § 136l(a)), filed July 20, 1990, alleged that on or about May 2, 1989, Respondent, Johnny Mrsny, purchased from Griswold Seed Company (Griswold), Norfolk, Nebraska, two five-pound bags of poison milo (SEBESTA'S POCKET GOPHER BAIT, EPA Reg. No. 10140-4 or PETERSENS POCKET GOPHER KILLER I, EPA Reg. No. 10031-1). The mentioned products are alleged to be restricted use pesticides (RUPs), which are to be applied only by, or under the direct supervision of, a certified applicator. Mr. Mrsny allegedly used the referenced pesticides to control gophers on 25 acres of alfalfa in Madison County. The complaint further alleged that Respondent was not a certified applicator and did not apply the RUP under the direct supervision of a certified applicator. Inasmuch as FIFRA section 3(d)(1)(C) provides that a RUP shall be applied only by or under the direct supervision of a certified applicator, Respondent was alleged to have violated section 12(a)(2)(F) of FIFRA, which makes it unlawful for any person to use any RUP other than in accordance with section 3(d).

In Count II of the complaint, it was alleged that Respondent violated section 12(a)(2)(G) of FIFRA in that he used the RUP in a manner inconsistent with its labeling. For these alleged violations, it was proposed to assess Respondent a penalty of $5,000.

Under date of October 23, 1990, Respondent answered, admitting the purchase from Griswold of two five-pound bags of poison milo on or about May 2, 1989. Respondent alleged that Griswold recommended use of the mentioned product for the control of gophers and averred that he used less than one-half bag of poison milo to treat the gopher problem on an approximate five-acre tract used for commercial enterprise and for which Respondent had a contract to mow. Regarding a statement given to an EPA representative on January 9, 1990, concerning the mentioned pesticide application, Respondent avers that he was informed that, if he filled out the statement, his use of the poison milo was so incidental that nothing would come of it on behalf of EPA.

Additionally, Respondent asserted that he was never informed by Griswold that the poison milo was a RUP, nor was he informed that the milo would have to be applied by a certified applicator or under the direct supervision of a certified applicator. In fact, he asserts Griswold instructed him on how to apply the poison milo for best results in controlling gophers. Respondent denied each and every allegation of the complaint except those, if any, specifically admitted, contested the amount of the proposed penalty

as excessive and in violation of its constitutional rights and requested a hearing.

This proceeding was assigned to me on November 2, 1990, and under date of November 6, 1990, Complainant filed a Motion for Accelerated Decision, contending that there was no issue of material fact and that Complainant was entitled to judgment as a matter of law. The motion referred to Respondent's answer wherein he admitted purchasing two five-pound bags of poison milo from Griswold Seed Company on May 2, 1989. The motion also refers to Mr. Mrsny's affidavit, taken by EPA representative Kenneth S. Bucholz on January 9, 1990, wherein he (Mrsny) stated that he purchased ten pounds of SEBESTA'S POCKET GOPHER BAIT, EPA Reg. No. 10140-4, from Griswold Seed Company, Norfolk, Nebraska, on May 2, 1989, and used this bait to control gophers on 25 acres of alfalfa he farmed in Madison County. He further states that when he purchased the bait, he was not asked to exhibit a certified applicator card and that no farmer or business has ever asked to see any type of certification.[1/]

The motion states erroneously that Respondent hasn't denied the allegation that he was not a certified applicator. Although the answer doesn't allege that Mr. Mrsny was a certified applicator, it contains no admission that he was not a certified applicator, and, in the final sentence, denies each and every

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[1/] The relevance of this assertion, of course, depends on whether it is Respondent's practice to purchase or apply pesticides.

allegation of the complaint, except those specifically admitted. Accordingly, Complainant's reliance on Rule 22.15(d) of the Part 22 Consolidated Rules of Practice to the effect that "(f)ailure to admit, deny or explain any material factual allegation. . . constitutes an admission" is misplaced.

In a letter to the ALJ, dated November 26, 1990, counsel for Complainant pointed out that Respondent received the Motion for Accelerated Decision on November 9, 1990, and that a response to the motion should have been filed not later than November 19, 1990. This position makes no allowance for the five additional days allowed by Rule 22.07(c), where service of a motion is by mail. The letter asserted that a response has not been received to date and, pointing to Rule 22.16(b) (40 CFR Part 22), to the effect that failure to timely respond to a motion may constitute a waiver of any objection thereto, asks that its motion be granted.

By a letter, dated November 30, 1990, counsel for Respondent, David H. Ptak, acknowledged receipt of a copy of Complainant's letter to the ALJ, dated November 26, 1990, and alleged that it appeared Mr. Rompage, counsel for Complainant, was attempting to use the many rules and regulations hidden in the Code of Federal Regulations to have this matter decided procedurally, rather than on the merits. The letter stated that Mr. Mrsny strongly objected to having this matter determined summarily, that the issues raised in his answer were legitimate and that, under the Fifth and Fourteenth Amendments to the U.S. Constitution, Mr. Mrsny had the

right to due process, [which included] the right to be heard.[2/] Mr. Ptak stated that there was nothing in the information sent to Mr. Mrsny, which he (Ptak) had reviewed, which would have alerted "us" to any procedural requirement as cited in Mr. Rompage's letter and that it appeared to be a situation where EPA, through its counsel, was hiding the ball from Mr. Mrsny. Mr. Ptak further stated that "we" attempted to settle this matter and, when these attempts were unsuccessful, "we" filed our request for hearing so that Mr. Mrsny could be heard and the merits of EPA's complaint determined. To do otherwise, would assertedly be a travesty of justice and allow EPA to prey upon individuals who do not have ready access to the Code of Federal Regulations. It was requested that the letter be considered an objection [to Complainant's motion] pursuant to 40 CFR § 22.16(b) as cited in Mr. Rompage's letter.

By a letter, dated March 27, 1991, counsel for Complainant pointed out that the November 30 letter from Respondent's attorney did not address its Motion for Accelerated Decision and did not state any reason for failing to respond to the motion in a timely

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[2/] The motion states flatly that issues of constitutionality are beyond the purview of this court [proceeding]. This assertion stems from a failure to distinguish between the power to declare a statute unconstitutional, which is thought to be reserved to the courts, and the power to deal with constitutional issues generally, which is within the purview of administrative agencies. See, e.g., Coors Brewing Company, Docket No. RCRA-VIII-90-09 (Order On Motions, January 4, 1991).

manner.[3] Moreover, it is alleged that the November 30 letter was not a proper response to the motion in that it was not served on the Regional Hearing Clerk and was not accompanied by an affidavit, certificate, other evidence or a legal memorandum. Complainant requested a ruling on its Motion for Accelerated Decision.

DISCUSSION

Although some of the arguments in counsel for Respondent's letter, dated November 30, 1990, might be more persuasive, if Respondent were not represented by counsel,[4] the letter is interpreted as an allegation that the Consolidated Rules of Practice, 40 CFR Part 22, were not available to counsel. Paragraph 19 of the complaint recites that a copy of the Rules of Practice is enclosed with the complaint, which is required by Rule 22.14(a). Nevertheless, it is possible that this requirement was not satisfied or that Mr. Mrsny neglected to furnish all papers received with the complaint to his counsel, Mr. Ptak. In view thereof, and because it is not literally accurate to say that Respondent has not denied the allegation he was not a certified

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[3] The second paragraph of the letter erroneously characterized the motion as for default.

[4] A respondent represented by counsel may be presumed to know that motions concerning the merits of a case may not lightly be disregarded.

applicator, a ruling on the motion for an accelerated decision will not be made at this time.[5/]

CONCLUSION

The parties will be directed to furnish pre-hearing exchanges in accordance with Rule 22.19(b):

By Complainant and Respondent

1. State the desired or required location for the hearing (see Rules 22.19(d) and 22.21(d)).

2. Furnish the names of expected witnesses and copies of any documents or exhibits proposed to be offered at the hearing to the extent not covered by specific requests below.

By Complainant

1. Provide Respondent's counsel with a copy of the Consolidated Rules of Practice (40 CFR Part 22) forthwith.

2. Provide a copy of the label for SEBESTA'S POCKET GOPHER BAIT and a copy of invoice or sales ticket evidencing Respondent's purchase of this product as alleged in complaint.

3. Explain process by which it was determined that Mr. Mrsny was not a certified applicator.

4. Admit or deny assertion in para. 5 of answer that Mr. Bucholz represented to Respondent that, if he filled out [signed] statement, nothing would come of it. If the allegation is denied, submit a summary of the conversation.

5. Furnish a copy of civil penalty computation worksheets and a statement, conforming to Rule 22.14(a)(5) (40 CFR Part 22), explaining reasoning behind proposed penalty. Explain basis upon which Respondent was determined to be in highest sales category for penalty calculation purposes.

5/ It would appear that, if Respondent intended to make an issue of whether he was certified, it would have been a simple matter to point out this inaccuracy in response to the motion.

By Respondent

1. State whether it is Respondent's practice to purchase or apply pesticides and, if the answer is affirmative, estimate the frequency thereof.

2. Submit a summary of the substance of the conversation with Mr. Bucholz as alleged in para. 5 of answer.

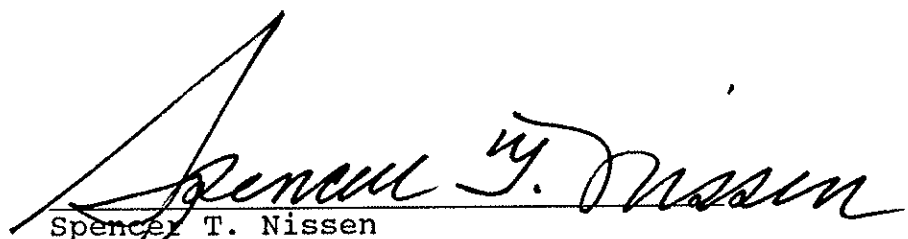
3. State whether Respondent has ever received any training in the application of restricted use pesticides and whether he has applied for and received a certified applicator's card or license since his conversation with Mr. Bucholz.

4. If Respondent is contending that the proposed penalty will adversely effect his ability to continue in business, furnish financial statements, copies of income tax returns or other data to support such contention.

Responses to this letter will be served the opposing party, the Regional Hearing Clerk and the undersigned on or before October 30, 1992.

Upon receipt and review of the responses, I will be in contact with counsel for the purpose of determining further proceedings.

Dated this 21st day of September 1992.



Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER**, dated September 21, 1992, in re: Johnny Mrsny, Dkt. No. IF&R-VII-1047C-90P, was mailed to the Regional Hearing Clerk, Reg. VII, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Helen F. Handon
Legal Staff Assistant

DATE: September 21, 1992

ADDRESSEES:

David H. Ptak, Esq.
Ptak & Schukei, P.C.
Attorneys At Law
111 South 2nd Street
Norfolk, NE 68702-0141

Henry F. Rompage, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. VII
726 Minnesota Avenue
Kansas City, KS 66101

Ms. Venessa R. Cobbs
Regional Hearing Clerk
U.S. EPA, Region VII
726 Minnesota Avenue
Kansas City, KS 66101