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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of )
JIM YOUNG )
d/b/a JIM YOUNG AERIAL SPRAYING )
RFD 1 )
ADAMS, NEBRASKA )
Respondent )

I.F. & R. Docket No. VII-1073-C-91P

Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. § 136 et seq. When Respondent failed to comply with the order of Administrative Law Judge requiring the exchange of prehearing information, it was found to be in default, pursuant to 40 C.F.R. § 22.17, to be liable for all counts of the Complaint, and assessed the amount of Eight Hundred Dollars (\$800).

ORDER ON DEFAULT

By: Thomas B. Yost
Administrative Law Judge

Dated: 8/17/92

APPEARANCES:

For Complainant:

Julie L. Murray
Assistant Regional Counsel
Air and Toxic Materials Branch
Office of Regional Counsel
U.S. Environmental Protection
Agency, Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent:

Jim Young
d/b/a Jim Young Aerial
Spraying
RFD 1
Adams, Nebraska 68301

### INTRODUCTION

This civil proceeding for the assessment of a penalty was initiated by the U.S. Environmental Protection Agency (Complainant) pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA), 7 U.S.C. § 1361, by issuance of a Complaint on November 30, 1990, charging Jim Young d/b/a Jim Young Aerial Spraying, (Respondent), with certain violations of the FIFRA and regulations promulgated thereunder. On or about March 16, 1992, Respondent submitted a letter which served as his answer to the Complaint. The answer, in substance, denied the allegations in the Complaint and claimed an inability to pay the penalty sought. The Complaint charges Respondent with use of a registered pesticide in a manner inconsistent with its labeling, in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. Section 136j(a)(2)(G). The Complaint proposed a civil penalty in the amount of Nine Hundred Dollars (\$900), which the Complainant adjusted to Eight Hundred Dollars (\$800) based on the Respondent's submission of financial information. A civil penalty in the amount of Eight Hundred Dollars (\$800) is now sought.

### FINDINGS OF FACT

Respondent is Jim Young d/b/a Jim Young Aerial Spraying, located at RFD 1, Adams, Nebraska 68301. On or about May 11, 1990, Respondent aerially applied CORNBELT 2,4-D 6 LB LOW VOL (EPA Registration Number 10107-40) to pasture land located in Section 14, Township 6-N, Range 8-E, Gage County, Nebraska. On

or about May 23, 1990, Complainant conducted an inspection and obtained samples of foliage from the property of Donald L. Hale, which is located north of the application site. Laboratory analysis of these samples detected the following 2,4-D pesticide residues: foliage from an ash tree contained 1.1 milligrams per kilograms (mg/kg); foliage from a peach tree contained 1.3 mg/kg; foliage from a maple tree contained 4.5 mg/kg; and foliage from a black walnut tree contained 0.83 mg/kg.

During the inspection, Complainant also obtained from Respondent documentation regarding the May 11, 1990 application, which included photographs of the label of CORNBELT 2,4-D 6 LB LOW VOL used in the application. The label of CORNBELT 2,4-D 6 LB LOW VOL states in part: "Applications by aircraft, ground rig and hand dispenser should be carried out only when there is no hazard from any spray drift. Do not apply in the vicinity of cotton, grapes, tomatoes, or other desirable 2,4-D susceptible crop or ornamental vegetation. Do not spray when wind is blowing towards susceptible crops or ornamental plants." The May 23, 1990, inspection disclosed that Respondent's use of CORNBELT 2,4-D 6 LB LOW VOL was inconsistent with the label directions in that the pesticide was applied in a manner which allowed it to drift onto susceptible ornamental vegetation in a non-target area.

Following the issuance of the Complaint, the matter was assigned to the undersigned Administrative Law Judge (ALJ) on March 23, 1992. By order dated March 24, 1992, the parties

failing settlement, were directed to exchange certain prehearing information consisting of witness lists, documentary evidence and arguments supporting their respective cases no later than April 28, 1992. The ALJ received a timely filing of Complainant's prehearing exchange. Respondent failed to submit its prehearing exchange by the April 28, 1992, deadline, and Respondent remains silent to this day. Complainant has filed a Motion for Default Order herein.

#### PROPOSED CIVIL PENALTY

Section 14(a)(2) of FIFRA provides for the assessment of a civil penalty of not more than One Thousand Dollars (\$1,000) for each violation against any "for hire" applicator who violates any provision of said Act, subsequent to receiving a Notice of Warning or a citation for a prior violation. Respondent received a citation for a prior FIFRA violation in a Complaint issued on June 29, 1988 for a proposed civil penalty of Five Hundred Dollars (\$500). Respondent paid a Three Hundred Dollar (\$300) penalty in accordance with a Consent Agreement and Consent Order filed December 28, 1988. Complainant now seeks a civil penalty in the amount of Eight Hundred Dollars (\$800) against Respondent.

The proposed civil penalty was calculated in accordance with the Environmental Protection Agency's July 2, 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Complainant originally sought a civil penalty in the amount of Nine Hundred Dollars (\$900) based on the determination that Respondent's size of business placed

Respondent in Category I. Respondent has provided Complainant financial information which indicates Respondent's size of business as having gross annual sales of between Fifty Thousand Dollars (\$50,000) and Two Hundred Thousand Dollars (\$200,000) per year. This would place Respondent in Category II for the purposes of this penalty calculation. Complainant has adjusted the penalty accordingly and now seeks a civil penalty in the amount of Eight Hundred Dollars (\$800) against Respondent.

The Complaint at issue in this matter alleges Respondent used the registered pesticide in a manner which was inconsistent with its labeling, in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. Section 136j(a)(2)(G). The proposed civil penalty for this violation according to the July 2, 1990 Enforcement Response Policy for FIFRA, for a Category II Respondent, is Eight Hundred Dollars (\$800).

#### CONCLUSIONS OF LAW

Pursuant to Section 14(a)(2) of FIFRA, 7 U.S.C. § 1361, Complainant has the authority to institute enforcement proceedings against "any private applicator or other person not included in paragraph (1) who violates any provision of this subchapter subsequent to receiving a written warning from the Administrator or following a citation for a prior violation . . . ." Respondent received a citation for a prior FIFRA violation in a Complaint issued on June 29, 1988 for a proposed civil penalty of Five Hundred Dollars (\$500). Respondent paid a \$300 penalty

in accordance with a Consent Agreement and Consent Order filed December 28, 1988.

FIFRA states that "it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling" under Section 12(a)(2)(G) of FIFRA, 7 U.S.C. Section 136j(a)(2)(G).

Respondent's answer to the Complaint did not raise any questions which could support a decision that Complainant has failed to establish a prima facie case, or justify the dismissal of the Complaint. An examination of the prehearing exchange documents submitted by Complainant buttress the allegations in the Complaint that Respondent used the registered pesticide in a manner inconsistent with its labeling. Complainant has established a prima facie case to support the allegation in the Complaint that Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. Section 136j(a)(2)(G).

Respondent's failure to comply with the prehearing order amounts to a default and constitutes an admission by Respondent of all facts alleged in the Complaint and a waiver of its right to a hearing regarding these factual allegations. 40 C.F.R. § 22.17(a). Upon a finding of default, the Presiding Officer shall issue a default order against the defaulting party. 40 C.F.R. § 22.17(b).

#### ULTIMATE CONCLUSION

It is concluded that Respondent is in violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. Section 136j(a)(2)(G).

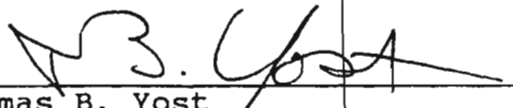
ORDER<sup>1</sup>

IT IS ORDERED, pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 1361, that:

1. Respondent, Jim Young d/b/a Jim Young Aerial Spraying, be assessed a civil penalty of \$800;
2. Payment of the full amount of the penalty assessed shall be made by forwarding a cashier's or certified check, payable to the Treasurer of the United States of America, to the following address within sixty (60) days of the entry of this decision and order:

Mellon Bank  
EPA - Region VII  
Regional Hearing Clerk  
P.O. 360748M  
Pittsburgh, PA 15251

3. Failure upon the part of the Respondent to pay the penalty within the prescribed time frame after entry of the final order shall result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

  
Thomas B. Yost  
Administrative Law Judge

Dated: \_\_\_\_\_

8/12/92

<sup>1</sup> Pursuant to 40 C.F.R. § 22.17(b), this order on default constitutes the Initial Decision in this matter. Unless an appeal is taken pursuant to 40 C.F.R. § 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. 40 C.F.R. § 22.27(c).

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR § 22.27(a), I have this date forwarded via certified mail, return-receipt requested, the Original of the foregoing ORDER ON DEFAULT of Honorable Thomas B. Yost, Administrative Law Judge, to Ms. Venessa R. Cobbs, Regional Hearing Clerk, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said ORDER ON DEFAULT 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 ORDER ON DEFAULT to the Administrator.

Dated: 8/17/92

Jo Ann Brown  
Jo Ann Brown  
Secretary, Hon. Thomas B. Yost

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION VII  
726 MINNESOTA AVENUE  
KANSAS CITY, KANSAS 66101

IN THE MATTER OF )  
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JIM YOUNG ) I.F.&R. VII-1073C-91P  
D/B/A JIM YOUNG AERIAL SPRAYING )  
ADAMS, NEBRASKA ) CERTIFICATION OF SERVICE  
 )  
RESPONDENT )  
\_\_\_\_\_ )

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties... (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Order on Default issued by the Honorable Thomas B. Yost along with the entire record of this proceeding has been served on Ms. Bessie Hammel, Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; that a copy was hand-delivered to Counsel for Complainant, Julie L. Murray, Assistant Regional Counsel, Office of Regional Counsel, Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas; and that a copy was served by certified mail, return receipt requested on Respondent, Jim Young, d/b/a Jim Young Aerial Spraying, RFD 1, Adams, Nebraska 68301.

If no appeals are made within 20 days after service of this Order on Default, and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. Section 22.27(c), and Section 22.30).

Dated in Kansas City, Kansas this 31st day of August, 1992.

Venessa R. Cobbs  
Venessa R. Cobbs  
Regional Hearing Clerk

cc: Honorable Thomas B. Yost  
Administrative Law Judge  
U.S. Environmental Protection Agency  
345 Courtland Street, N.W.  
Atlanta, Georgia 30365