March 7, 2014

EPA Withdraws FIFRA Penalty Case Against Broker: License Preserved

Note: Our client, the licensed Customs broker described below has reviewed the recap that follows and has allowed us to publish it without objection.

The Environmental Protection Agency ("EPA") serves an important role in regulating hazards to the environment and threats to personal health. However, it must act within the limits of its authority. We recently encountered what appeared to have been an overreaching of that authority in a case where the EPA sought to impose liability on a licensed Customs broker under circumstances where the EPA enforced statutes and regulations established no such liability.

Often, whether it is the EPA or another federal or state agency, when a penalty assessment is made against a corporation or individual, a decision is made by the alleged violator to settle rather than fight the seemingly limitless resources of the government. For licensed Customs brokers, the admission of a violation of any part of any law or regulation administered by Customs can be as bad as a finding of a violation in an administrative proceeding or by a court in a judicial proceeding. With a full understanding of the risks, there are instances when fighting the government may be the only choice.

According to the information available to the public released by the EPA, in August 2011, EPA inspectors visited the office of our client, a licensed Customs broker. The EPA inspectors requested and were given copies of twenty-three import files involving shipments of zinc borate. Under the Federal Insecticide, Fungicide and Rodenticide Act, EPA form NOA 3540-1 is required to be filed with the EPA prior to importation of a pesticide. Zinc borate, if intended to be used as a pesticide, is subject to the NOA filing requirement, but if it is intend for use as a fire retardant to be incorporated in other products, it is NOT subject to the NOA and EPA registration requirements.

In February 2013, the EPA issued claims against the importer AND the broker for the failure to file notices of arrival. The goods had been released by U.S. Customs without incident and there was no harm to the environment. The EPA claims were for the FIFRA statutory maximum of $7,500 for each importation, amounting to $172,500 against the importer and a like amount against the broker. The importer settled with the EPA for $34,000, and the EPA continued to press the broker for a penalty that was separate from and in addition to the settlement it had with the importer, going so far as to institute an EPA docket citing our client for penalties under FIFRA.

The negotiations were protracted. Over time, the EPA reduced its claims against our client in increments from the original $172,500 to $14,100 claimed in the EPA docketed proceeding.

As counsel, we strongly believed that there was only ONE obligation to file the notice, and having penalized the importer, EPA had no business seeking a penalty against the broker,

absent an allegation of conspiracy or financial interest in the failure to report the impending arrival of the goods. Further, the EPA has NEVER exacted a penalty for a FIFRA violation against a broker. Its consent agreements with brokers serve no precedent, as they reflect the brokers' agreement to settle without a determination by an EPA administrative law judge or the courts.

Our broker client was and is not any of the persons identified in the FIFRA statute as obligated to file the NOA. It was not and is not a registrant, not a commercial applicator, not a wholesaler, not a dealer, not a retailer and not a distributor of any kind. The EPA case was premised largely on the conjecture that the broker "could" have been the importer, even though it was not the importer of record nor was it consignee on the Customs entry, it never took physical possession of the goods, the importer's trucker removed the goods from the pier and the importer's bond was used to clear the goods.

While settlement discussions continued to reduce the amount that the EPA was willing to accept to close the case, there was a larger concern for the broker. Under U.S. Customs regulations, 19 CFR 111.53(c), Customs can revoke a license if:

(c) The broker has violated any provision of any law enforced by Customs or the rules or regulations issued under any provision of any law enforced by Customs

If our broker client settled with the EPA, and admitted a violation of FIFRA, the fact that Customs has its own FIFRA regulations in 19 CFR 12.110-117, meant that Customs could have instituted proceedings to revoke the broker's license.

In response to many of the EPA's settlement offers, we simply requested that the EPA withdraw its case as being beyond the scope of the statute. On February 27, 2014, the EPA did just that. It withdrew the case and stated in its withdrawal that it had no intention of pursuing any action against our broker client on the 23 shipments that were the basis of its complaint. On March 6, 2014, the assigned administrative law judge issued an order of dismissal with prejudice against the EPA, officially ending the case.

As there was no final decision by the EPA in the case at the agency, and the case never got to the courts, the EPA could seek to invoke the FIFRA penalty provisions against a licensed Customs broker in the future. The brokerage community should know that at least in this instance, the licensed Customs broker fought the EPA and walked away with no penalty, and its license has been preserved.

Our client and we are most pleased with the outcome, which could only have been achieved because the broker was willing to oppose the enforcement efforts of the EPA.

If you'd like to speak with me about this case, please feel free to contact me.