

**BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.**

In re:)	
)	
Umpqua Research Company)	FIFRA Appeal No. 97-7
)	
Docket No. 10-94-0228-FIFRA)	
)	
)	

FINAL ORDER

On June 6, 1997, Umpqua Research Company ("Umpqua") filed an appeal with the Board from an Initial Decision issued by Administrative Law Judge Carl C. Charneski ("Presiding Officer"). In that decision, the Presiding Officer, following a hearing, assessed a penalty of \$13,000 against Umpqua for two violations of § 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A), and one violation of § 12(a)(1)(E), 7 U.S.C. § 136j(a)(1)(E), of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") by selling an unregistered and misbranded pesticide. The two § 12(a)(1)(A) violations involved Umpqua's distribution of an unregistered pesticide, MCV Iodinated Resin ("MCV Resin").^{1/} The § 12(a)(1)(E) violation involved Umpqua's exportation of MCV Resin to Thailand without the required bilingual label.^{2/} At the

^{1/}Section 12(a)(1)(A) provides that, with certain exceptions not relevant in this case, it is unlawful for any person to distribute or sell "any pesticide that is not registered under section 136a of this title * * *."

^{2/}Section 12(a)(1)(E) prohibits the sale of any pesticide that is
(continued...)

start of the hearing, the parties submitted stipulations in which Umpqua admitted the violations at issue in this case. Thus, the only issue at the hearing was the amount of the penalty to be assessed. Initial Decision at 2.

As the Initial Decision states, Umpqua stipulated to the following:

Umpqua has been a registered pesticide producing establishment since October 15, 1987. Stip. No. 1. Umpqua sold the pesticide MCV Resin to the Boeing Company on April 17, 1992. The sale amount was \$12,000. Stips. No. 2 & 4. Umpqua also sold MCV Resin to Hamilton Standard on July 29, 1994. The amount of this sale was \$9,052. Stip. No. 3. At the time of the Boeing and Hamilton Standard sales, Umpqua did not possess a pesticide registration number for MCV Resin. See Stip. No. 5. It was not until September 27, 1995, after the critical events in this case occurred, that Umpqua obtained a conditional pesticide registration for the pesticide MCV Resin. This conditional pesticide registration, however, was for manufacturing use only. Stip. No. 6; Tr. 9, 44.

On April 30, 1993, Umpqua sold MCV resin to the Texas Engineering Co., Ltd. ("Texas Engineering"), in the country of Thailand. On July 2, 1993, the respondent sold MCV Resin to Loxley Utilities Services Co., Ltd. ("Loxley Utilities"), also located in Thailand. The total amount of these two sales was \$10,620, plus freight. Stip. No. 8. The labels on the MCV Resin sold to Texas Engineering and Loxley Utilities were printed in English only. English is not the official language of Thailand. Stip. No. 9.

Initial Decision at 2.

^{2/}(...continued)

adulterated or misbranded. It is undisputed that an exported pesticide is misbranded if its labeling does not appear in both English and the language of the country of import. See FIFRA § 2(q)(1) (definition of misbranded), 7 U.S.C. § 136(q)(1); FIFRA § 40 C.F.R. § 168.65 (Pesticide export label and labeling requirements).

In assessing a penalty, the Presiding Officer considered those factors required by FIFRA § 14(a)(4), 7 U.S.C. § 1361(a)(4): "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." In addition, in determining the gravity of the violation, the Presiding Officer considered Umpqua's history of compliance and any evidence of good faith or lack thereof. See 40 C.F.R. § 22.35(c). The Presiding Officer further stated that:

Section 22.35 of the Consolidated Rules of Practice provides that, in addition to the statutory penalty criteria discussed above, in assessing a civil penalty the Judge is to consider, "(1) respondent's history of compliance with the Act or its predecessor statute and (2) any evidence of good faith or lack thereof." 40 C.F.R. § 22.35. Compliance history and good faith are considerations properly taken into account under the "gravity of the violation" criterion of Section 14(a)(4).

Initial Decision at 3 n.1. After considering these factors, the Presiding officer assessed a \$4,000 penalty for each of the two § 12(a)(1)(A) violations^{3/} and a \$5,000 penalty for the

^{3/}The Region had proposed a \$5,000 penalty for each of these violations but the Region has not appealed the penalty reductions for the § 12(a)(1)(A) violations. In reducing the penalty to \$4,000, the Presiding Officer stated that although there were significant hazards associated with exposure to MCV Resin, these hazards were reduced somewhat in this case given the small quantity and limited use of the resin involved and the fact that the resin delivered to Hamilton and Boeing was "subject to close scrutiny by scientific and medical personnel associated with the NASA space program." Initial Decision at 6. The Presiding Officer concluded that the record did not support a similar reduction for the § 12(a)(1)(E) export violation.

§ 12(a)(1)(E) violation for a total penalty of \$13,000. In so doing, the Presiding Officer stated:

Umpqua was aware of the fact that MCV Resin was a pesticide within the meaning of Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and that this product was subject to FIFRA registration. Respondent, therefore, was negligent in selling the unregistered MCV Resin to Boeing and to Hamilton Standard. The fact that Boeing and Hamilton Standard may have used the MCV Resin in connection with NASA's space program does not make Umpqua any less negligent for selling an unregistered pesticide.

* * * * *

Umpqua also was negligent in exporting the MCV Resin to Thailand in violation of FIFRA Section 12(a)(1)(E). * * * EPA's publication of the export labeling provisions in the Federal Register [(45 Fed. Reg. 50,274 (July 28,1980) and 58 Fed. Reg. 9,062 (Feb. 18, 1993))] and in the Code of Federal Regulations [(40 C.F.R. § 168.65)] was sufficient to put all exporters of pesticides on notice as to its requirements. As an exporter of the pesticide MCV Resin, Umpqua should have been aware of this labeling requirement and it was negligent in failing to so comply.

Initial Decision at 5-6. The Presiding Officer also pointed out the dangers associated with exposure to MCV resin, including eye irritation, insomnia, conjunctivitis, inflammation of the nasal mucous, bronchitis, tremor, rapid heartbeat, diarrhea, and weight loss. *Id.* at 6. He also noted the "serious consequences" of exporting a pesticide without the required bilingual labeling. "For instance, non-English speaking individuals who come into contact with the pesticide will not know what precautions to take when handling the product. Nor will these individuals know what

to do if they are exposed to the product, or if a spill occurs." *Id.* (citation omitted).

In its appeal, Umpqua argues that although it is liable for the violations alleged in the complaint, the Presiding Officer erred in assessing a penalty in this case. Specifically, Umpqua states that the Presiding Officer should have used his discretion to issue a warning in lieu of assessing a penalty pursuant to FIFRA § 14(a)(4), 7 U.S.C. § 1361(a)(4).^{4/} We find no merit to this assertion.

As this Board stated in *In re Green Thumb Nursery, Inc.*, FIFRA Appeal No. 95-4a, slip op. at 24-25 (EAB, March 6, 1997), 6 E.A.D. ____:

On its face, FIFRA does not require the Agency to issue warnings instead of penalties, or to impose penalties of zero. The Agency is vested with discretion, which is manifest from FIFRA's use of the word "may," in delineating the Administrator's authority to issue a warning in lieu of assessing a penalty. * * * In other words, even if the Administrator were to find that either of the requisite conditions for issuing a warning existed, the Administrator nevertheless retains the discretion to assess a penalty.

(Citations and footnote omitted). We find nothing in the Initial Decision indicating that the Presiding Officer abused his discretion in assessing the penalty in this case. On the

^{4/}FIFRA § 14(a)(4) states, in pertinent part:

Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.

contrary, it appears from the Initial Decision that the Presiding Officer conducted a careful analysis of the violations and applicable penalty factors, and we find ourselves in complete agreement with the Presiding Officer's penalty determination.

Accordingly, the Presiding Officer's penalty determination is summarily affirmed and a civil penalty of \$13,000 is assessed against Umpqua. Umpqua shall pay the full amount of the civil penalty within sixty (60) days after receipt of this final order, unless otherwise agreed to by the parties. Payment shall be made by forwarding a cashier's check or certified check in the full amount payable to the Treasurer, United States of America at the following address:

EPA - Region X
Regional Hearing Clerk
P.O. Box 36903
Pittsburgh, PA 15251-6903

So ordered.

ENVIRONMENTAL APPEALS BOARD

Dated: 3/3/98

By: _____/s/_____
Kathie A. Stein
Environmental Appeals Judge

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Final Order in the matter of Umpqua Research Company, FIFRA Appeal No. 97-7, were sent to the following persons in the manner indicated:

By Certified Mail,
Return Receipt Requested:

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Dated: 3/3/98

_____/s/
Annette Duncan
Secretary