UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
SKARDA FLYING SERVICE,	)	Docket No.FIFRA VI-672C
	)	
Respondent	)	
	)	

INITIAL DECISION

DATED: October 17, 1996

FIFRA: Pursuant to Section 14(a)(2)of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA, or Act),7 U.S.C. 1361(a)(2), Respondent SKARDA Flying Service Inc. is assessed a civil penalty of $5,000 for the use of a registered pesticide in a manner inconsistent with its labeling in violation of FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G). The FIFRA Enforcement Response Policy is found inconsistent with the statute, FIFRA §§14(a)(2) and 14(a)(4), in its failure to allow for any reduction from the maximum statutory penalty amount for first offenses by "for hire" applicators.

APPEARANCES:

For Complainant: Pat Spillman, Jr., Esq.
Assistant Regional Counsel
U.S. EPA Region 6
Dallas, Texas

For Respondent: Thomas L. Barron, Esq.
Little Rock, Arkansas

Proceedings

The Region 6 Office of the United States Environmental Protection Agency (the "EPA" or "Complainant"), filed a Complaint on September 27, 1991 against Skarda Flying Service, Inc. ("Respondent" or "Skarda"), of Hazen, Arkansas. The Complaint charged Respondent with 38 violations of Section 12(a)(2)(G) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §136j(a)(2)(G) -- using a registered pesticide in a manner inconsistent with its labeling. The Respondent, a "crop duster," was charged with 38 applications of the pesticide 2,4-DB on rice fields, a use not permitted by the product's label. The Complaint proposes a civil penalty of $19,000, on the basis of $500 per violation, pursuant to FIFRA §14(a)(2), 7 U.S.C. §136*l*(a)(2).

In its September 4, 1992 Amended Answer, Respondent admitted to all allegations establishing liability. Accordingly, on May 19, 1993, Chief Administrative Law Judge ("ALJ") Jon G. Lotis granted Complainant's motion for an accelerated decision on liability. Judge Lotis found that Respondent committed the 38 violations as alleged in the Complaint. Judge Lotis later, on October 13, 1994, denied Respondent's motion to dismiss on the ground of waiver due to the prior enforcement action on these violations by the State of Arkansas. The undersigned ALJ was redesignated to preside in this proceeding on September 18, 1995. The parties indicated in a joint status report that they could not agree on the amount of a civil penalty and requested an administrative hearing be held on that issue.

The administrative hearing convened before ALJ Andrew S. Pearlstein on December 12, 1995 in Little Rock, Arkansas. Complainant presented two witnesses, and Respondent presented three witnesses. The transcript of the hearing consists of 209 pages, and 27 exhibits were received into evidence. The parties each submitted post-hearing briefs and reply briefs. The record closed on April 1, 1996 upon the ALJ's receipt of the reply briefs.

FINDINGS OF FACT

For the most part, the material facts underlying this case are not in dispute. Although Respondent admitted liability and the sole issue to be determined is the penalty amount, background facts must still be provided as necessary to provide a context and basis for the determination of the issues concerning the relevant civil penalty factors.

Respondent, Skarda Flying Service, Inc., operates an agricultural flying service at its facility in Hazen, Arkansas. Skarda Flying Service is a small, seasonal business, in active operation generally from March until September or October each year. (Tr. 186). During in-season operations, Respondent employs two pilots and a few other employees. (Tr. 148). Respondent services approximately 40 to 50 farm operations located within a four mile radius of Hazen, in Prairie County. The Hazen area in eastern Arkansas is the leading rice-producing region of the United States (Tr. 123). Gary Skarda, a native of the area and descendant of rice farmers, is a licensed pilot and the owner, operator, and manager of Skarda Flying Service, Inc. (Tr. 141).

The pesticide known as 2,4-DB 1.75, containing the active ingredient 4-(2,4-dichlorophenoxy) butyric acid, is registered with EPA under FIFRA. The label for 2,4-DB states its use as a "selective post-emergence herbicide for cocklebur control in peanuts and soybeans." (Ex. 3). Under another registration, 2,4-DB is also used on alfalfa and clovers. (Tr. 126). The label does not provide for its use on rice. 2,4-DB is applied on soybeans at

a rate of from 0.2 to 0.4 pounds per acre. (Tr. 126). In the Hazen area, rice is commonly planted adjacent to fields of soybeans and peanuts. (Tr. 128).

Rice farmers in Arkansas did nevertheless commonly use 2,4-DB on rice in low concentrations, and request their aerial applicators to do so in the period for some years up to and including 1989. (Ex. 4, p.15 , Tr. 151). A similar pesticide, 2,4-D is labelled for use on rice. (Tr. 128). When 2,4-DB is sprayed on rice plants, it is metabolized into 2,4-D plus carbon dioxide and water. (Tr. 129). 2,4,-D is more toxic to plants and animals than 2,4-DB. (Tr. 129).

The U.S. Department of Agriculture conducted studies in the 1970's, in cooperation with the University of Arkansas and manufacturers, toward getting 2,4-DB approved for application to rice. Although the tests were successful, 2,4-DB was never labelled for rice because a tolerance was never established. A small amount of residue was found on some samples, and the manufacturers felt that the necessary tolerance studies would not be economically justified. (Tr. 125-126).

Skarda, at the request of its customers, applied 2,4-DB on rice in some 38 applications between May 5 and June 6, 1989. Several of those applications consisted of multiple applications to different fields for the same customer, separated only by a short interval. (Tr. 181). If those are combined, there would have been 33 applications (Tr. 162). The 2,4-DB was mixed with Propanil, and applied at rates of between 0.04 and 0.09 pounds per acre. (Tr. 127). Gary Skarda recorded these applications in his log book (Ex. 27). The application of an unauthorized pesticide to a food crop could subject the crop to seizure by the Food and Drug Administration of Department of Agriculture before distribution (Tr. 45).

Around this time, the Arkansas State Plant Board ("Plant Board") became aware of allegations of such use of 2,4-DB on rice, and sent an inspector to Respondent's premises to investigate. Upon reviewing the clearly listed unlawful applications in the log book, the Plant Board cited Skarda for these unlawful applications in 1989. At a hearing held before the Plant Board on March 23, 1990, Gary Skarda admitted to applying the herbicide on rice. The Board issued a letter of reprimand and placed Skarda on probation for one year. (Ex. 4, p. 23). The Plant Board reaffirmed this decision in a hearing on Skarda's appeal held on June 7, 1990 (Ex. 5, p. 12).

At that time the Arkansas Plant Board had no authority to impose fines or civil penalties on violators of FIFRA (or for violations of State laws regulating pesticides under the authority of FIFRA). Under a Memorandum of Understanding between the Arkansas Plant Board and the EPA (Ex. 12), the EPA reviewed the

Plant Board's action and determined that the State sanction appeared inappropriately lenient. (Tr. 39). Region 6 then sent its inspector to Respondent's facility on February 6, 1991, and reviewed Skarda's log books with Gary Skarda's full cooperation. The EPA then brought this Complaint.

In September 1992, the Plant Board charged Skarda with another violation of FIFRA §12(a)(2)(G) (and the corresponding State law) (Ex. 6). Respondent, along with ten other aerial applicators, was charged with applying a mixture of Grandstand and 2,4-D to rice. Although both were labelled for use on rice, no tolerance had been established for the mixture. Respondent and the other crop dusters were ordered to attend a retraining program before issuance of their 1993 licenses (Ex. 10, p.7). This mixing practice was later allowed by the EPA and Plant Board (Tr. 168).

Respondent has operated as a generally successful small business over the past five years, with an improving financial status in the most recent year of record, 1994. Gross revenues have averaged about $320,000 per year from 1990 to 1994, with a low of $233,000 in 1991 and a high of $459,000 in 1994. (Ex. 25). Respondent had gross revenues of about $412,000 for the first seven months of 1995 (Ex. 26). Cash flow has generally increased each year from 1990 to 1994, from a negative figure in 1990 to a positive cash flow of $120,000 in 1994. (Ex. 24).

Respondent's cash flow picture is complicated by the high rate of depreciation of aircraft equipment, and the need for expensive maintenance, repair, and replacement of equipment. (Exs. 13-18, Tr. 146). Respondent borrowed $360,000 in 1994 for the purchase of two new airplanes. (Tr. 170). Respondent has used some personal assets, such as certificates of deposit, to help secure that debt. Gary Skarda draws a salary of $25,000 to $30,000 per year, and has borrowed $20,000 from the company for personal use. (Tr. 169). Virtually all cash generated by the business is returned to the business to meet expenses. (Tr. 171).

DISCUSSION

Assessment of civil penalties for violations of FIFRA is governed by Section 14(a), 7 U.S.C. 1361(a). Subdivision (1) provides for penalties of up to $5000 per violation for registrants, dealers, commercial applicators, and other distributors. Skarda, however, falls within the ambit of FIFRA §14(a)(2), applicable to violations by "for hire" applicators. It provides that:

> "any applicator . . . who holds or applies registered pesticides, or uses dilutions of registered pesticides, only to provide a service of controlling pests without

> delivering any unapplied pesticide to any person so served, and who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $500 for the first offense nor more than $1,000 for each subsequent offense." 7 U.S.C. §136*l*(a)(2).

Subdivision (4) of this section states:

> "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 violations." 7 U.S.C. §136*l*(a)(4).

The Supplemental Rules of Practice for FIFRA enforcement proceedings further direct the ALJ to consider a respondent's prior history of compliance and any evidence of good faith or the lack therof. 40 CFR §22.35(c). The Complainant here has proposed assessment of a total civil penalty of $19,000 on the basis of 38 violations multiplied by the maximum amount of $500.

The EPA Rules of Practice require the ALJ to consider any civil penalty guidelines issued under the relevant statute, and to state specific reasons for deviating from the amount of the penalty recommended in the complaint. 40 CFR §22.27(b). EPA develops such penalty policies to help ensure that regional enforcement personnel calculate penalties appropriate to the violations, and that penalties are assessed fairly and consistently throughout the nation. The Presiding Officer "may either approve or reject a penalty suggested by the guidelines," and "has the discretion either to adopt the rationale of a particular penalty policy where appropriate or to deviate from it where circumstances warrant." In re DIC Americas, Inc., TSCA Appeal No. 94-2, at 6 (EAB, September 27, 1992).

In this FIFRA enforcement proceeding, the Complainant has relied principally on the Enforcment Response Policy for FIFRA, promulgated by the EPA's Office of Compliance Monitoring, Office of Pesticides and Toxic Substances, dated July 2, 1990 (the "ERP", Ex.2). The EPA Regional Office determined that a civil penalty was appropriate in this case, rather than a warning. The ERP states that a civil penalty is the preferred remedy for most violations, and no prior warning is required for violations by "for hire" applicators (Id., p. 10). The EPA also felt Respondent's violations here posed an actual or potential risk of harm to humans or the environment, and threatened the integrity of the Agency's regulatory program.

In determining the amount of the civil penalty, the EPA simply

followed the directive in the ERP that, when a civil penalty is the appropriate response for a first violation by a "for hire" applicator, "that civil penalty will be the statutory maximum of $500." (Id., p. 19). The ERP's civil penalty matrix for violations of FIFRA §14(a)(2) is only applicable for subsequent violations, for which the maximum civil penalty is then $1000. (Id.). The EPA therefore multiplied the number of alleged violations, 38, by $500, to arrive at a proposed civil penalty of $19,000.

The ERP provides for no reduction from the maximum penalty for first offenses by "for hire applicators." However, FIFRA §14(a)(2) states that the penalty shall be "not more" than $500 for this class of violations, while the ERP in effect states the penalty will be not less than $500 per violation. The ERP has not been promulgated as a rule and cannot of course supersede or contradict the statute. The ERP's failure to consider the possibility of a range of penalties below the maximum for first violations by "for hire" applicators is on its face inconsistent with FIFRA §14(a)(2). FIFRA does not distinguish between this class of violations and others in its directive in §14(a)(4) to consider the gravity of the violation and the respondent's ability to pay, in determining the appropriate amount of a penalty. Under FIFRA, therefore, penalties may be reduced from the maximum when warranted by application of the facts to the statutory penalty factors. In the circumstances of this case I find that a substantial reduction is warranted, and the penalty suggested by the ERP is therefore reduced.

Although the ERP matrix was not followed, the ERP's principles, and its consideration of penalty adjustment factors and criteria, can be used as the basis for discussion of the issues in this case. The ERP does not explain why only the maximum penalty should apply to first violations by "for hire" applicators, while the various penalty factors are applied to adjust the amount for other violations. In the circumstances of this case, particularly where multiple violations lead to a substantial penalty for a "for hire" applicator, I find the ERP inadequate in its failure to consider the statutory penalty adjustment factors. Both parties in effect recognized this reality by substantively litigating those factors at the hearing.

Initially, the imposition of the maximum penalty would not be justified here due to the multiplication effect. The large number of relatively minor violations multiplies and exaggerates the total amount of the penalty. This effect is recognized in the ERP, which recommends reducing the matrix value of such penalties by 50% where multiple count violations exist. (Ex. 2, p. C-1, Table 3). Although a significant penalty is warranted in this case, this exercise of mechanically following the ERP resulted in the exaggerated penalty amount proposed by the Complaint.

The hearing focused primarily on four penalty factors

discussed below: the risk of harm to human health and the environment; Respondent's good faith or culpability; Respondent's compliance history; and the Respondent's ability to pay the penalty.

- Risk of Harm to Human Health and the Environment

The ERP cites the risk of harm to human health and the environment as major adjustment criteria in weighing the gravity of the violation (Ex. 2, p. B-1). On this issue, the preponderance of the testimony showed that the risk of harm from Respondent's applications of 2,4-DB to rice was minor. This militates toward a substantial reduction from the maximum amount of the penalty.

Respondent's expert witness on this issue, Dr. Roy Smith, was shown to be eminently well qualified. He holds a doctorate in agronomy and weed science, and worked as a research scientist for 38 years at the U.S. Department of Agriculture, Agriculture Research Service, in Stuttgart, Arkansas. Dr. Smith published over 500 articles and also taught Agronomy at the University of Arkansas. The primary focus of his work was the control of weeds in rice through the development and testing of herbicides.

Dr. Smith provided the only testimony that specifically addressed the risk of using 2,4-DB on rice. As stated above in the Findings of Fact, 2,4-DB was tested for application to rice, but never finally labelled only because the tolerance studies would not have been economical. It is labelled and used on soybeans, peanuts, and alfalfa. The herbicide 2,4-DB converts to 2,4-D, which is labelled for use on rice. These facts amply buttress Dr. Smith's conclusion that there was no significant risk of harm to human health or the environment by the application of 2,4-DB to rice in the low concentrations applied by Skarda.

In contrast, the testimony of Complainant's witness on this issue, Van Kozak, Chief of the Pesticide Section in Region 6, was couched in generalities and speculation. The sum total of his testimony on this issue was that, in the absence of completed tolerance studies, the human health effects of 2,4-DB on rice were unknown. He also pointed out that the label states that the herbicide is toxic to fish, birds and wildlife if improperly applied. The EPA cannot be faulted for initially taking this cautious position. Enough became known about the effects of 2,4-DB through Dr. Smith's testimony, however, to fill the knowledge void to the extent of showing a lack of significant risk under the facts in this case. As Mr. Kozak testified, it remains true that Respondent's application of a pesticide in a manner inconsistent with the label still represents a clear violation and harm to the regulatory program. The threat of harm to human health or the environment was, however, minor, indicating a substantial reduction in the penalty is warranted.

- Good Faith and Culpability

The ERP also cites culpability and good faith of a respondent as factors that could affect the gravity of the violation (EX. 2, pp. 27, B-2). While Respondent did know that 2,4-DB was not labelled for rice at the time of the applications, there are mitigating facts that detract from his culpability. Respondent was only applying the pesticide as directed by his customers, the farmers, who actually purchased the product. Mr. Skarda testified that he was told that the low concentration 2,4-DB mixture with Propanil had been approved by the the Agricultural Extension Station, and that it was commonly used at that time in Arkansas. The fact that Respondent recorded the 2,4-DB applications in his log book, and did not try to hide them, indicates he believed they were not illegal despite the labelling.

The violations here were only for a period of one month, and ceased as soon as Respondent was visited and warned by the Arkansas Plant Board inspector in June 1989. Skarda has not done such applications since, and has cooperated fully with the Plant Board and EPA. He has already been subject to enforcement and sanctions for these violations by the Arkansas Plant Board, and lost some business as a result. These circumstances fall short of showing good faith at the time of the violation, but indicate a cooperative attitude and moderately low level of culpability that also militates towards some reduction from the maximum penalty.

- Compliance "History"

The word history is in quotes above because the only other enforcement matter involving Respondent actually occurred subsequent to the violations alleged in this proceeding. Even if violations committed subsequent to those alleged in the Complaint, but prior to the hearing, can properly be considered as a penalty factor, the subsequent enforcement action here was not shown to be a final order that would constitute a "prior" violation. The last action taken was a recommendation by the Pesticide Committee to the full Arkansas Plant Board that Respondent take a training course. The final action of the Plant Board is not in evidence. Mr. Skarda testified that the findings concerning the propriety of mixing of the two pesticides at issue were later reversed. Thus, Respondent's compliance history is not an aggravating factor, and the lack of any other established violations could be considered another factor in favor of reducing the amount of the penalty.

- Ability to Pay

It is not necessary to examine in detail the evidence on Respondent's finances, which included expert CPA testimony by both parties. Complainant's witness, William Foerster, did establish that the overall picture is of a successful business that could

likely afford to pay this penalty, at least under some installment arrangement or through borrowing, and manage to survive. However, Respondent, through the testimony of its accountant, Dan Rieke, demonstrated that the proposed $19,000 figure would be a major expense to a small business that is already heavily indebted. It would leave Respondent no reserve to meet unanticipated expenses which can easily arise in the crop dusting business.

Rather than analyze Respondent's tax returns and accounting statements, a look at the ERP guideline of 4% of gross revenues (Ex. 2, p. 23) for the current year and prior three years is instructive. Under this formula, the penalty should not exceed approximately $15,000. This indicates that the $19,000 figure would be difficult for Respondent to pay. The preponderance of the evidence on this issue would warrant some reduction of the penalty. However, my decision on the appropriate penalty in this case is based on the other factors discussed above.

CONCLUSION

Although it was shown that there was no sigificant environmental damage in this case, the use of a pesticide in a manner inconsistent with its label is a serious violation that strikes at the heart of the EPA's pesticide regulatory program. The consequences can be very serious, including the seizure of adulterated food crops. The pesticide label is the chief means to ensure that those consequences do not ensue. Although the circumstances of this case favor a substantial reduction in the penalty from the amount sought, the penalty should still be sufficient to act as a deterrent and to uphold the integrity of the EPA's pesticide regulatory program.

I find that a civil penalty in the amount of $5000 appropriately balances these considerations. The penalty sought here was the maximum permitted under the statute, FIFRA §14(a)(2), and was based on the ERP which, contrary to the language of the statute, did not allow for any reduction. The $19,000 sought was exaggerated due to the large number of relatively minor violations -- each was one brief application to one field. Respondent showed several mitigating factors, particularly the lack of risk to human health and the environment, and Respondent's good faith actions to halt the practice immediately upon being notified of the violation. Assuming 38 violations, the $5000 figure represents approximately $130 per violation, or a bit more than 25% of the amount sought by the Complaint. This amount represents an appropriate adjustment in view of all the circumstances shown in this proceeding.

ORDER

1. Respondent is assessed a civil penalty of $5000.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this order by submitting a certified or cashier's check in the amount of $100, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 8
P.O. Box 360859M
Pittsburgh, PA 15251

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalties within the prescribed statutory time period, after entry of the final order, then interest on the civil penalty may be assessed.

5. Pursuant to 40 CFR §22.27(c) this Initial Decision shall become the final order of the Agency, unless an appeal is taken purusant to 40 CFR §22.30 or the Environmental Appeals Board elects, sua sponte, to review this decision.

Andrew S. Pearlstein
Administrative Law Judge

Dated: Washington, D.C.
October 17, 1996