UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

88 JUL 26 P12:41

IN THE MATTER OF	DOCKET NO. IF&R VIII-88-243C
AGLAND, INC.,	
RESPONDENT	

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT ("FIFRA") - Venue

1. Respondent corporation's objection as to venue was waived when it failed to interpose a timely and sufficient objection to the scheduling of subject hearing in Denver, Colorado, instead of Weld County, Colorado.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

2. The sale of Avitrol, a restricted-use pesticide, to, and for application by, a person who is not a certified applicator, violated Section 12(a)(2)(F) of the Act, 7 U.S.C. 136j(a)(2)(F) and an appropriate penalty should and will be assessed for such violation as provided by Section 14 of FIFRA, 7 U.S.C. 136 l.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

3. Evidence of previous violations of FIFRA by Respondent showed a history of non-compliance which resulted in an upward adjustment of the civil penalty assessed.

APPEARANCES

For Complainant:

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For Respondent:

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(303) 790-4103.

INITIAL DECISION

By Complaint dated September 19, 1989, and filed September 22, 1988, Complainant United States Environmental Protection Agency, Region VIII (hereinafter "EPA", "the Agency", or "Complainant"), by its Chief, Toxic Substances Branch, who was and is authorized to institute subject action, charges Respondent Agland, Inc. (hereinafter "Respondent" or "Agland") with violation of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or "the Act"), Section 12(a)(2)(F), 7 U.S.C. 136j(a)(2)(F), for the reason that, on December 4, 1987, Agland sold Avitrol, a restricted-use pesticide (hereinafter "RUP"), to Phillip E. Camenisch, who did not then possess certification as a certified applicator for the application of restricted-use pesticides. For said alleged violation, Complainant proposes that a civil penalty in the amount of $5,000 be assessed.

7 U.S.C. §136j states:

> Unlawful Acts -
> (a) In general -
> (1) . . . it shall be unlawful for any person . . . to make available for use, or to use, any registered pesticide classified for restricted use for some or or all purposes other than in accordance with section 3(d) . . . and any regulations thereunder: Provided, that it shall not be unlawful to sell, under regulations issued by the Administrator, a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator . . .

FIFRA §3(d)(1)(C)(2), 7 U.S.C. §136a(D)(1)(C)(2) provides:

> If the Administrator classifies a pesticide, or one or more uses of such pesticide, for restricted use because of a determination that the acute dermal or inhalation toxicity of the pesticide presents a hazard to the applicator or other persons, the pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator. (Emphasis supplied.)

In its Answer, filed October 4, 1988, Respondent denied that it violated the Act as alleged.

An evidentiary hearing, requested by Respondent, was held in Denver, Colorado, on May 17, 1989. On said date, just prior to going on the record (Transcript [hereinafter "TR] 5), Respondent counsel, citing 7 U.S.C. §1361 (a)(3), raised an objection to subject hearing being held in Denver County, Colorado, instead of Weld County, Colorado, where Respondent corporation's principal place of business is located. Responding to said objection, Complainant counsel stated (TR 6-7):

> Your prehearing Order, dated October 17, 1988, . . . requested counsel for the parties to state where they recommended that the hearing be held.
>
> On December 28 (1988), the respondent, in his prehearing statement, suggested that it be held in Weld County, Colorado (Greeley). On January 10, 1989, you stated that the hearing would be (on) May 17, 1989, in Denver. In the intervening five months, the respondent has made no statement, no objection regarding your indication that the hearing would be held in Denver . . .

Complainant further submitted that Respondent makes no showing of prejudice from the hearing being conducted in Denver.

I then ruled that venue had been waived as no objection was made until the date of hearing on May 17, 1989, even though the time and place of the hearing was announced on January 10, 1989.

It will be noticed that Respondent's counsel maintains his office in Englewood, Colorado (near to or a part of metropolitan Denver).

40 C.F.R. 22.35(b) - EPA Rules of Practice - provides that:

> (b) Venue. The . . . hearing shall be held in the county, parish or incorporated city of the residence of the person charged unless otherwise agreed in writing by all the parties.

It is thus recognized by the applicable regulation that the venue of the hearing is not jurisdictional and may be waived. 1/ The venue has relation to the convenience of the litigants and may be waived or laid by consent of the parties (Iselin v. La Coste, 147 F.2d 791, l.c. 795 (10)(5th Cir., 1945), citing Neirbo Co. v. The Bethlehem Shipbuilding Corporation, 308 U.S. 165, 60 S.Ct. 153; see also 28 U.S.C.A. §1406(b)).

Upon consideration of testimony elicited at said hearing and the documentary evidence appearing in the record, along with the Proposed Findings of Fact, Conclusions of Law, Briefs and Arguments filed herein, I make the following:

FINDINGS OF FACT

1. Respondent Agland, Inc., is an incorporated Colorado cooperative association operating places of business in Gilcrest and Eaton, Colorado, which provide supplies, including feed, seed, petroleum, fertilizers and pesticides, to the agricultural industry in Colorado (Respondent [hereinafter "R"] Brief, page 2). It is stipulated that Agland's annual gross sales exceed $30 million (TR 50).

2. Agland is a "person" within the meaning of FIFRA Section 2(s) and is therefore subject to regulation.

3. At all times relevant to this proceeding, Agland's business included selling, offering for sale and making available RUP products to persons and thus was and is subject to EPA's FIFRA pesticide dealer statutory and regulatory provisions.

1/ The undersigned does not disclaim its inadvertence in placing the venue in Denver rather than in the Respondent corporation's county of residence; however, I find that this record supports Complainant's argument that venue was waived and that Respondent suffered no prejudice from the obvious error.

4. On March 18, 1988, an EPA inspection of Agland's facility at Eaton, Colorado was conducted by Rod Glebe, an EPA Consumer Safety Officer (TR 8).

5. Agland made available and sold Avitrol, a RUP, to Phillip Camenisch on December 4, 1987 (Complainant [hereinafter "C"] Exhibit [hereinafter "EX"] 5; TR 35-36).

6. Said Phillip Camenisch was not a properly certified RUP applicator from June 20, 1981, to April 7, 1988 (C EX 7). Prior to June 20, 1981, he had been, for three years, properly certified (TR 24).

7. Said Avitrol, although ordered by and sold to Camenisch in December, 1987, was not delivered and invoiced to Camenisch until February 18, 1988 (Respondent [hereinafter "R"] EX B; TR 77-78).

8. Subject Avitrol was not delivered to Camenisch, even though he paid for it on December 4, 1987, as Agland held up delivery until Camenisch's "current license number" was furnished (TR 78).

9. Agland obtained the (certificate) number appearing on its work order (R EX A) from the wife of Phillip Camenisch when Mrs. Camenisch was reached by telephone after unsuccessful attempts by Agland's division director to contact Camenisch by telephone (TR 79). After the certificate number was received, Agland delivered the subject Avitrol to Camenisch (TR 81).

10. Agland did not know or suspect that Camenisch's certificate had expired in 1981 until a telephone conversation with EPA's Consumer Safety Officer who had previously inspected Agland's facility on March 17, 1988 (TR 82; TR 26).

11. Agland's personnel, upon learning that Camenisch was not a certified applicator, took necessary action to get Camenisch certified as they got books to him, made sure he filled them out and "got them sent in" (TR 82). Camenisch's certification was renewed in April, 1988 (TR 25; TR 95; C EX 7).

12. Subject Avitrol sold to Camenisch on December 4, 1987, and delivered to him on February 18, 1988, was picked up by Agland on May 13, 1989, four days prior to the instant evidentiary hearing (TR 83). An invoice giving Mr. Camenisch credit for the product was issued along with a work order showing product returned (R EX C).

13. After EPA's discovery that Camenisch did not have a current certification as a RUP applicator, EPA's Consumer Safety Officer, Glebe, contacted Agland's manager and advised getting Camenisch certified if Agland intended to sell "any more restricted chemicals" to him; Glebe also contacted Phillip Camenisch who was not able to produce a current certification (TR 24).

14. Although Phillip Camenisch's expiration date as a certified RUP applicator was June 29, 1981, Agland's sales log, which lists the date of purchase, the customer's name and address, along with the invoice number and certification number, stated that Camenisch's expiration date was April, 1988. Camenisch told Inspector Glebe, in 1988, that he was not familiar with when his certificate expired (C EX 10; TR 24).

15. The Avitrol label has printed on it that it is a restricted-use pesticide (TR 21; C EX 16); that it is hazardous to fish, non-target birds and to humans (TR 36).

16. All formulations and use-patterns of Avitrol are restricted and have been since around September, 1980 (TR 22).

17. When Inspector Glebe talked to Camenisch, after the date of the inspection in March, 1988, Camenisch had subject Avitrol in his possession and stated he had used it - that it had been applied, and Camenisch indicated where he had used it (TR 28-29). Glebe also testified that when he contacted Camenisch (the last week of March, 1988), Camenisch showed him an unopened

box of Avitrol and he had an open box of Avitrol, the contents of which he had used to kill birds in a cattle feed lot and in areas of a building located there. Glebe opined that Camenisch did not open the subject 10-pound box of Avitrol but was using Avitrol he had in the open box (TR 94). At this time, Camenisch's certificate was expired, as it was not renewed until April, 1988 (TR 95).

18. Agland, in 1983, paid a civil penalty for violation of FIFRA for the reason that it sold a RUP to a person not a certified applicator (C EXs 11 and 12).

19. On November 7, 1985, Agland entered into a Consent Agreement wherein it admitted the allegations of a Complaint charging it with violation of TSCA [sic], 15 U.S.C. §2601 et seq., Docket No. IF&R-148 (C EXs 13 and 14).

20. On June 3, 1988, Agland was issued a Warning Letter by U.S. EPA Region VIII, Toxic Substances Branch, informing Agland that an EPA inspection on March 15, 1988, reflected that it violated §12(a)(2)(B) - Recordkeeping Requirements - regarding the sale of two RUPs (C EX 15).

CONCLUSIONS OF LAW

1. Respondent Agland, Inc., violated §12(a)(2)(F) of FIFRA, 7 U.S.C. 136j(a)(2)(F), by making available and selling Avitrol, a RUP, to a person who did not then possess certification as a certified applicator of RUPs.

2. An appropriate civil penalty should and will be assessed against Respondent Agland, Inc., for subject violation.

CIVIL PENALTY

In determining the appropriate penalty to be assessed for the violations found as alleged in Count I of the Complaint, I am referred to the Act and Regulations.

Section 14 of the Act provides, in pertinent part, as follows:

Sec. 14, PENALTIES.

(a) Civil Penalties. -

(1) In General. - Any registrant . . . retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty . . . of not more than $5,000 for each offense. . . .

* * *

(4) Determination of Penalty. - In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of person charged, the effect on the person's ability to continue in business, and the gravity of the violation. 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.

40 C.F.R. §22.35(c) provides:

(c) Evaluation of Proposed Civil Penalty. - In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider, in addition to the criteria listed in Section 14(a)(3) 2/ of the Act, (1) respondent's history of compliance with the Act, or its predecessor statute, and (2) any evidence of good faith or lack thereof. The Presiding Officer shall also consider the guidelines for the Assessment of Civil Penalties published in the FEDERAL REGISTER (39 FR 27711), and any amendments or supplements thereto.

The Chief of the Field Operations Section for the Toxic Substances Branch of EPA, Region VIII, Robert W. Harding, prepared a FIFRA proposed penalty calculation (C EX 1). In conformity with the Guidelines for the Assessment of Civil Penalties under FIFRA, 39 FR 27711 et seq. (C EX 3), he considered the statutory criteria, supra, and recommended that a civil penalty in the total sum of $5,000 be assessed against Respondent Agland, Inc., citing the

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2/ The subsection referred to is subsection (4).

charge as being that referred to in the guidelines as E28: "Use of Disposal of a Pesticide in a Manner Inconsistent with its Labeling - " He considered the size of Agland's business as Category V (Over One Million Dollars Annual Sales) and concluded that Adverse Effects (from subject violation) were Highly Probable. The last criterion is an evaluation of "gravity" or seriousness of the violation. I disagree with the witness' evaluation of the gravity of the violation and have concluded, on this record, that while Agland's size is admittedly of Category V, adverse effects (from subject violation) cannot be characterized as either "not probable" or "highly probable; therefore, I find the assessment of the middle figure of $2800 to be appropriate. The guidelines at page 27712, Column 1, state that the gravity of a violation is a function of

1. The potential . . . to injure man or the environment;
2. The severity of such potential injury;
3. The scale and type of use anticipated;
4. Identity of persons (so) exposed;
5. . . . history of compliance, and actual knowledge, and
6. Evidence of good faith.

Avitrol, a RUP, is a poison presenting hazards to humans and domestic animals (see Avitrol label, C EX 16). Wildlife feeding on bait treated with Avitrol may be killed and humans who swallow it may experience unconsciousness; medical treatment also may be required if the poison reaches a person's eyes. As Avitrol is a poison to control undesirable birds, the scale of use as here anticipated (in a cattle feed lot) would be potentially extensive. Wildlife and non-target birds are subject to being exposed, as are persons who are not knowledgeable respecting the use, handling and placement of the poison.

Important to determining an appropriate penalty to be here assessed is Agland's history of compliance and actual knowledge of the character of and danger inherent in the improper use and handling of subject RUP. On three (3) previous occasions, Agland has been cited for violations not unlike the one here considered (C EXs 11, 12, 13, 14 and 15). An Initial Decision (IF&R Docket VIII-91C, 1983) assessed a civil penalty in the sum of $500 (C EXs 11 and 12). In 1985, Agland paid a civil penalty in the sum of $1080 under the provisions of a Consent Agreement (C Exs 13 and 14). On the premise that civil penalties are assessed as a means of "achieving compliance" with the Act and pertinent regulations, it would appear that the penalties heretofore assessed were not sufficient to achieve such purpose. In addition, a Warning Letter (C EX 15) was issued to Agland on June 3, 1988.

Subsequent to the filing of the instant Complaint, Respondent Agland retrieved the box of Avitrol from Camenisch (approximately 15 months after its delivery). Some two months after delivery, Agland's district director was instrumental in "getting Camenisch certified", and in the last year held a meeting for customers and put on a full day's training session to get certified those customers about due for recertification or who have never been certified (TR 85).

At the present, Agland keeps a "running file" on all certification numbers in the State of Colorado (TR 85) and keeps copies of their growers' EPA licenses along with a log sheet indicating the expiration dates of "certificates". Agland does not now take telephone orders for RUPs from anybody whose certificate number and expiration date has not been listed with Agland. Starting in 1989, Agland obtained from EPA a list of all certified applicators (TR 88). The above changes in Agland's compliance efforts have

been instituted subsequent to and as result of the filing of the instant Complaint (TR 88-89). These changes are commendable and are indicative of a modicum of good faith, however, it is clear that, had said procedures been instituted prior to the instant violation, when Agland was aware of its responsibilities under the Act, the serious violation here considered would have been avoided. If such changes are brought about only after enforcement efforts are exerted, the provisions of FIFRA are greatly emasculated and compliance in the future by Respondent and others similarly situated will not be achieved unless and until it is established that such violations will not be countenanced.

In the premises, because of Agland's history of non-compliance, an adjustment upward of 10% is indicated and the $2800 penalty provided by the guidelines is hereby increased to $3080. The Final Order appearing hereinbelow should be and it is hereby proposed.

FINAL ORDER 3/

1. Pursuant to Section 14(a)(1) of FIFRA, as amended, a civil penalty in the amount of $3080 is assessed against Respondent Agland, Inc., for the violation established by the evidence elicited herein.

2. Payment of the $3080, the civil penalty assessed, shall be made within sixty (60) days after receipt of the Final Order by forwarding a cashiers or certified check, made payable to the Treasurer, United States of America, to

Mellon Bank
EPA - Region 8
(Regional Hearing Clerk)
P.O. Box 360859M
Pittsburgh, PA 15251.

SO ORDERED.

DATED: JULY 24, 1989

Marvin E. Jones
Administrative Law Judge

3/ 40 C.F.R. §22/28)c) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless an appeal is taken by one of the parties or the Administrator elects to review the Initial Decision. §22.30(a) provides for an appeal herefrom within 20 days.

CERTIFICATE 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 INITIAL DECISION of Marvin E. Jones, Administrative Law Judge, to Mrs. Joanne McKinstry, Regional Hearing Clerk, Office of Regional Counsel, United States Environmental Protection Agency, Region VIII, 999 18th Street, Suite 500, Denver, Colorado 80202-2405, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said INITIAL DECISION 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.,

who shall forward a copy of said INITIAL DECISION to the Administrator.

DATED: JULY 24, 1989

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ