IN RE ARAPAHOE COUNTY WEED DISTRICT

FIFRA Appeal No. 98–3

FINAL DECISION

Decided June 14, 1999

Syllabus

The Arapahoe County Weed District ("Weed District") appeals a June 9, 1998, Initial Decision in which the Presiding Officer assessed a civil penalty of $2,400 for a single violation of section 12(a)(2)(F) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(2)(F). The Presiding Officer concluded that the Weed District had violated FIFRA § 12(a)(2)(F) when its employee sold a restricted use pesticide ("RUP") to an uncertified applicator. He further held that the violation warrants a penalty rather than a warning, rejecting the Weed District's argument that a penalty is unnecessary to deter future violations by the Weed District. He concluded that the $2,400 penalty amount recommended by the Region had been properly calculated.

The Weed District filed an appeal on July 6, 1998, asserting that, in order to find that the Weed District violated section 12(a)(2)(F) by selling an RUP to an uncertified applicator, "there must be proof of an intention that the restricted use pesticide would not be used by or under the supervision of a certified applicator." It further argues that, even if it violated FIFRA as alleged, the violation warrants a warning letter rather than a civil penalty because it was unintentional and did not cause environmental harm.

Held: (1) FIFRA § 12(a)(2)(F) prohibits the sale of a restricted use pesticide to an uncertified applicator. The seller's intent is not an element of the violation. The Weed District's contrary interpretation is not supported by the legislative history of FIFRA, and is inconsistent with statutory objectives.

(2) The Board agrees with the Presiding Officer that a civil penalty, rather than a warning, is appropriate, particularly where, as here, a pesticide seller failed to exercise due care in fulfilling its statutory and regulatory duties.

(3) The Board affirms the Presiding Officer's penalty assessment of $2,400.

Before Environmental Appeals Judges Scott C. Fulton, Edward E. Reich, and Kathie A. Stein.

Opinion of the Board by Judge Reich:

The Arapahoe County Weed District ("Weed District") has appealed a civil penalty assessment of $2,400 for a single violation of Section

12(a)(2)(F) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136j(a)(2)(F). For the reasons stated below, the appeal is denied and the civil penalty assessment of $2,400 is affirmed.

I. *BACKGROUND*

A. *Statutory Background*

FIFRA mandates the registration with EPA of all pesticides offered for sale or distribution within the United States. FIFRA § 3(a), 7 U.S.C. § 136a(a). As part of the registration process, each pesticide is classified by the Administrator of EPA (or his or her delegatee) as being for general use, or restricted use, or both. FIFRA § 3(d)(1)(A), 7 U.S.C. § 136a(d)(1)(A). The appropriate classification depends on the risks a pesticide's intended uses may pose to the applicator, the public and/or the environment. FIFRA §§ 3(d)(1)(B) and (C), 7 U.S.C. §§ 136a(d)(1)(B) and (C). Section 3(d)(1)(C)(i) provides that a pesticide that has been classified for restricted use because it presents a hazard to the applicator or other persons may be applied for that restricted use "only by or under the direct supervision of a certified applicator."[1] FIFRA § 3(d)(1)(C)(i), 7 U.S.C. § 136a(d)(1)(C)(i). FIFRA § 12(a)(2)(F), 7 U.S.C. § 136j(a)(2)(F), makes it unlawful:

> [T]o distribute or sell, or to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with section 136a(d) [FIFRA § 3(d)] of this title and any regulations thereunder * * *.[2]

A civil penalty may be assessed for a violation of section 12(a)(2)(F) pursuant to FIFRA § 14(a), 7 U.S.C. § 136l(a).

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[1] EPA conducts the training and certification program for private pesticide applicators in Colorado. Transcript of October 23, 1997 Hearing ("Tr.") at 54. An individual may become a certified applicator in Colorado by taking a home-study course and passing a test administered by EPA. Tr. at 44. The applicator is then issued a certification card by EPA that is valid for four years, and must take retraining to obtain recertification. 40 C.F.R. § 171.11.

[2] FIFRA § 12(a)(2)(F) contains the exception 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." The Presiding Officer found that Respondent neither alleged nor demonstrated that the exception applies here, and his findings have not been appealed. *See* Initial Decision at 13.

B. *Factual and Procedural Background*

The Weed District is a non-profit governmental entity created under Colorado law that sells pesticides to local farmers at cost (plus a ten percent handling fee) at its office in Strasburg, Colorado. The Weed District collects approximately $50,000 a year from pesticide sales and receives an additional $35,000 a year from property taxes. Initial Decision at 2–3.

The Weed District sells one restricted use pesticide ("RUP"), Tordon 22K, EPA Registration No. 62719–6. Initial Decision at 4. Tordon 22K has been classified for restricted use because it requires protective equipment for the applicator and because it poses risks to nontarget species and the environment. Tr. at 28.

The essential facts are not in dispute. On March 6, 1996, Mr. Michael P. Rudy, an EPA employee, performed a routine compliance inspection at the Weed District's office. Tr. at 12; Memorandum of Inspection (undated) (Complainant's Exhibit ("C Ex") 2). During that inspection, he reviewed the sales slips for twelve randomly selected sales transactions involving Tordon 22K. *Id.;* Tr. at 17. One of these sales slips indicated that Mr. Rodney Cronk, the Weed District's sole employee, had sold 7½ gallons of Tordon 22K to Mr. Lowell Piland on September 2, 1995. Tr. at 18; Sales Ticket, C Ex 4. During the inspection, Mr. Rudy also reviewed Mr. Cronk's Restricted Use Pesticide Sales Log (C Ex 3). Tr. at 18. The RUP Sales Log contained an entry indicating a September 2, 1995 sale of 7½ gallons of Tordon 22K to Mr. Piland, and a notation that Mr. Piland's pesticide applicator certification would expire on March 5, 1996. C Ex 3.

After returning to his office, Mr. Rudy reviewed a computer printout, dated November 22, 1995 (C Ex 6), that listed Colorado private pesticide applicators and the issuance and expiration dates of their certification cards. Tr. at 20–21. The computer printout gave an issuance date of "1991/05/06" and an expiration date of "1995/05/06" for Mr. Piland's certification card.[3] Based on the computer printout, Mr. Rudy concluded that the March 5, 1996 expiration date noted in the Weed District's RUP Sales Log was incorrect, and that Mr. Piland had not been certified when

[3] C Ex 6 is titled "Colorado Private Pesticide Applicators by ID # (Dealer's List), All Records in Private Pesticide Applicator System." The "Date Run" is 11/22/95. The record also contains a list titled "Colorado Private Pesticide Applicators by Name." The "Date Run" is indicated as "09/21/ ." C Ex 8. Both list Mr. Piland's name and ID number, an "issue date" of "1991/05/06" and an expiration date of "1995/05/06."

Mr. Cronk sold him 7 ½ gallons of Tordon 22K on September 2, 1995.[4] Tr. at 21.

Mr. Rudy conducted a follow-up inspection at Mr. Piland's residence on May 14, 1996. Memorandum of Inspection (C Ex 9). He informed Mr. Piland that his certification had expired in May 1995, not May 1996, and obtained his affidavit. *See* Affidavit of Lowell D. Piland (May 14, 1996) (C Ex 5).

Region VIII filed a complaint ("Complaint") on September 24, 1996, charging the Weed District with the sale of an RUP to an uncertified applicator in violation of FIFRA § 12(a)(2)(F). The Complaint proposed a civil penalty of $2,400 for the violation. Mr. Timothy R. Osag, Senior Enforcement Coordinator for Region VIII, calculated a civil penalty of $2,400 for the violation in accordance with EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (July 2, 1990) ("ERP") (C Ex 1). Tr. at 58–70. The ERP implements the requirement in FIFRA § 14(a)(4) that EPA consider specified penalty factors in proposing a penalty under FIFRA. Tr. at 59.

The Chairman of the Arapahoe County Pest District sent a brief letter ("Answer") (C Ex 7) to the Regional Hearing Clerk on October 17, 1996 (misdated 1–11–1996). Administrative Law Judge Spencer T. Nissen (the "Presiding Officer") deemed the letter to be the Weed District's Answer to the Complaint. Tr. at 6; Initial Decision at 2. The Weed District acknowledged that it had sold an RUP to Mr. Piland in September 1995, after Mr. Piland's certification had lapsed, but contended that the proposed penalty amount was "excessive" because "[t]here was no harm intended and no harm was incurred." *Id.* It requested a hearing.

The Presiding Officer conducted an administrative hearing on October 23, 1997. Mr. Cronk testified that he sold 7 ½ gallons of Tordon 22K to Mr. Piland on September 2, 1995. Tr. at 106–07. He stated that he had believed at that time that Mr. Piland's certification was valid because he checked his Rolodex card file before making the sale and found an entry indicating that Mr. Piland's card would not expire until May 5, 1996. Tr. at 107. Mr. Cronk did not remember when he had recorded the expiration date of Mr. Piland's card. Tr. at 109. However, he did recall that the ink on Mr. Piland's card had been badly smudged on that occasion. *Id.* He acknowledged that he had not called EPA to verify the expiration

[4] In January 1996, Mr. Piland applied for recertification, apparently mistakenly believing that his certification would expire in May 1996. Tr. at 123–24. He was recertified in March 1996. Memorandum of Inspection (C Ex 9); Tr. at 123–24.

date, either on that occasion or on the date of the sale, but explained that, "we [Mr. Cronk and Mr. Piland] was sure it was a '96. Definitely was or we would have called."[5] *Id.*

Mr. Piland's testimony was consistent with that of Mr. Cronk. He stated that, when he purchased the Tordon 22K on September 2, "we looked at the Rolodex and came up with a date * * *. I'm assuming it came from my card * * *." Tr. at 121. He had no specific memory of Mr. Cronk having written down the expiration date on a prior occasion but he was "positive" that Mr. Cronk had done so. Tr. at 127. Although Mr. Piland had stated in his affidavit (C Ex 5) that he or Mr. Cronk had telephoned EPA sometime prior to September 2, 1995, "to determine [his] true expiration date," he stated at the hearing that he must have been mistaken that a telephone call had been made. Tr. at 127. Mr. Piland stated that he had not bought the Tordon 22K on September 2, 1995, for immediate use, but that he had not discussed his intended use of the pesticide with Mr. Cronk. Tr. at 118. *See also* Tr. at 111.

Mr. Timothy Osag testified that he had calculated a penalty amount of $2,400 in accordance with EPA's ERP.[6] Tr. at 58–70. While not conceding that any violation occurred, or that a penalty rather than a warning is appropriate, the Weed District has stipulated that all of the penalty calculations were accurate, except for the "culpability" value assigned to the

[5] The Initial Decision contains a factual finding that Mr. Cronk looked at Mr. Piland's certification card on September 2, 1995, as well as on the occasion when he wrote down the expiration date in his Rolodex file. Initial Decision at 10 and 19. The finding was based on the following testimony of Mr. Cronk:

> Q: So the last time that you saw Mr. Piland's card was on September 2, 1995?
> A: I don't know the exact date. I know I put it on the file. That was the last time I seen it.
> Q: The date that was on the sales receipt would be the last time you saw it?
> A: Yes.

Tr. at 115–16. Mr. Piland, who testified that his recall of the details of the sale transaction was not very good (Tr. at 117), was not asked, and did not testify, as to whether Mr. Cronk looked at his card. We find the testimony far from clear on this point but need not resolve this issue to resolve the appeal.

[6] Because most of the determinations on which the penalty was calculated are not controverted, we will not go into them in detail.

violation.[7] Tr. at 62–63. The Weed District contends that the culpability value should be "0" because Mr. Cronk's violation was unintentional. Mr. Osag had assigned a culpability value of "2" based on his conclusion that the violation had been caused by Mr. Cronk's negligence.[8] Tr. 64.

C. *Initial Decision and Notice of Appeal*

The Presiding Officer issued an Initial Decision on June 9, 1998, in which he held that:

> 1. [The Weed District's] sale on September 2, 1995, of Tordon 22K * * * was a violation of FIFRA § 12(a)(2)(F) * * *.
>
> 2. FIFRA is a strict liability statute and no finding of intent to violate the Act or to act in disregard thereof is required [for liability] * * *.
>
> 3. The violation is serious and warrants a penalty rather than simply a warning.

Initial Decision at 12. The Presiding Officer stated that there was "some force" to the argument the Weed District made in its post-hearing brief that FIFRA § 12(a)(2)(F) makes it unlawful to sell an RUP to an uncertified purchaser only if EPA can demonstrate that the seller had an intent to sell the pesticide to an uncertified applicator. *Id.* at 14.[9] However, he concluded that the Weed District's argument is "foreclosed" by a 1989

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[7] The ERP specifies base penalty amounts for particular types of FIFRA violations that are based on the gravity level assigned to the violation and the size of business of the violator. The ERP further provides that the base penalty amount may be adjusted upward or downward to take account of the actual circumstances of the violation. The violator's "culpability" under the circumstances of the violator is one of five prescribed gravity adjustment criteria.

[8] Mr. Osag determined a base penalty amount of $3,000 for the violation and reduced that amount by 20% (to $2,400) based on the total value he assigned to the five gravity adjustment criteria in the ERP. *See supra* n.7. He assigned a value of "2" for the gravity adjustment criterion of "culpability." If a value of "0" had instead been assigned for the gravity adjustment criterion of culpability, as the Weed District suggests, the ERP would have recommended that the base penalty amount be reduced by 40% (to $1,800).

[9] *See* Respondent's Brief in Support of Proposed Findings, Conclusions and Order at 4–5; Respondent's Reply Brief in Support of Proposed Findings of Fact, Conclusions and Order at 1–2.

decision of EPA's Chief Judicial Officer in *In re Custom Chem. & Agric. Consulting, Inc.,* 2 E.A.D. 748 (CJO 1989), in which the CJO "flatly rejected" the argument that intent is an element of a FIFRA § 12(a)(2)(F) violation.[10] Initial Decision at 15. The Presiding Officer added that "FIFRA has repeatedly been held to be a strict liability statute" in Agency administrative decisions. *Id.* at 16.

The Presiding Officer then explained why he had concluded that the violation warranted a penalty, rather than a warning. He noted the Weed District's argument that it had rectified its past problems and thus a fine was not necessary to prevent future violations. He rejected this argument, however, noting that "the deterrent value of a sanction is not directed solely at the violator * * * but also is intended generally to discourage a casual attitude toward compliance with the law and to act as a deterrent to similar violations by others." *Id.* at 18. Because of this consideration, the Presiding Officer concluded that "a penalty rather than a simple warning is the appropriate sanction here." *Id.*

The Presiding Officer then held that the $2,400 penalty recommended by the Region had been properly calculated in accordance with the ERP. *Id.* at 18–20. With specific regard to the factor of "culpability" (the only aspect of the penalty calculation that the Weed District contests), he held that a culpability value of "2" was appropriate because Mr. Cronk had been negligent in that he incorrectly transferred the expiration date from Mr. Piland's badly smudged card to a Rolodex file, and subsequently sold an RUP to Mr. Piland even though he lacked adequate information from which to determine whether Mr. Piland was a certified applicator at the time of the sale. *Id.* at 20.

The Weed District filed an appeal on July 6, 1998, in which it argues that:

> In order to find that the Weed District has violated [Section 12(a)(2)(F)] 7 U.S.C. § 136j(a)(2)(F) by selling a restricted use pesticide to an uncertified applicator, there must be proof of an intention that the restricted use pesticide would not be used by or under the supervision of a certified applicator.

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[10] The Presiding Officer relied on the Chief Judicial Officer's holding in *Custom Chemical* that "FIFRA § 12(a)(2)(F) * * * does not permit sales of a restricted use pesticide to uncertified persons," unless authorized by regulation. Initial Decision at 16, citing *Custom Chemical,* 2 E.A.D. at 751. The Presiding Officer stated that, although *Custom Chemical* did not address the precise issue of statutory interpretation raised here, its holding "rejects, by necessary implication, any contention that intent is an element of a violation of the cited section." *See* Initial Decision at 16.

Notice of Appeal at 1. It contends, therefore, that Region VIII has not established that a violation occurred because Mr. Cronk did not intend that the Tordon 22K would be used by an uncertified person. *Id.* at 8, 10. The Weed District argues, alternatively, that even if it violated FIFRA as alleged, the violation is minor and therefore warrants a warning letter rather than a civil penalty. *Id.* at 8.

Region VIII responds that the Presiding Officer's decision should be affirmed. Region's Reply Brief (July 21, 1998). It contends that intent is not an element of a violation of FIFRA § 12(a)(2)(F). It maintains that the Presiding Officer properly imposed a penalty, rather than issuing a warning, in light of the circumstances of the violation.

II. *DISCUSSION*

We affirm the Presiding Officer's holding that the Weed District violated section 12(a)(2)(F) when its employee sold 7½ gallons of Tordon 22K, an RUP, to an applicator who did not have a valid certification at the time of the sale. *See* Initial Decision at 12. FIFRA is a strict liability statute. As we stated in *In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782, 796 (EAB 1997):

> The environmental statutes are intended to be action forcing, and brook no excuse for failure to achieve the required result. * * * The environmental statutes * * *, including FIFRA, consistently have been construed as imposing strict liability for failure to meet their requirements.

Consistent with FIFRA's strict liability approach, section 12(a)(2)(F) prohibits selling an RUP to an uncertified applicator. An intent to violate the statute is not an element of the violation.

The Weed District's argument that an unlawful intent is an element of a FIFRA § 12(a)(2)(F) violation is not supported by the statutory language. That statutory language, quoted *supra,* is repeated here for the reader's convenience. FIFRA § 12(a)(2)(F) provides that it is unlawful:

> [T]o distribute or sell, or to make available for use, or to use any registered pesticide classified for restricted use for some or all purposes other than in accordance with section 136a(d) [FIFRA § 3(d)] of this title and any regulations thereunder * * *.

The Weed District interprets the statutory phrase "for some or all purposes other than in accordance with section 136a(d) [FIFRA § 3(d)]" as modifying the phrase "to sell * * * any [RUP]." It contends that the word "purpose" in this section "unquestionably means that the elements necessary to establish a violation include a subjective intent requirement." Appeal Brief at 5. It then reasons that the statutory language makes it unlawful to sell an RUP to an uncertified applicator only if the seller has the *purpose* (i.e., *intent*) of making an unlawful sale.

The Weed District's contention is without any legal basis and is based on a misreading of the statutory language. As Region VIII has argued, the statutory phrase "for some or all purposes" modifies the phrase "classified for restricted use." Since a pesticide may be classified as an RUP for some or for all of its uses (i.e., purposes), FIFRA § 12(a)(2)(F) provides that it is unlawful to sell an RUP in contravention of section 3(d), whether the pesticide has been classified as an RUP for some purposes or for all purposes.

The legislative history of FIFRA supports the Region's interpretation of the statute, rather than the reading proposed by the Weed District. When Congress substantially amended FIFRA in 1972, and created the foundation for the present regulatory scheme, one of its main objectives was to "strengthen[] regulatory controls on the use and users of pesticides."[11] In furtherance of that objective, FIFRA was amended to require that all pesticides be classified for general use or restricted use at the time of registration, and that restricted use pesticides be applied by or under the supervision of a certified applicator. FIFRA § 3.[12] The purpose of section 12(a)(2)(F), according to a House of Representatives Committee on Agriculture Report on the legislation, is:

> [T]o make it unlawful for any person to make available for use or to use a pesticide, classified for restricted use for some or all purposes, for its restricted uses without complying with the restrictions imposed under this Act.

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[11] H.R. Rep. No. 92–511, 92d Cong., 1st Sess. (1971), at 4.

[12] The legislative history of the 1972 amendments to FIFRA reveals that Congress attached great importance to these new provisions in section 3. The House of Representatives Committee on Agriculture Report on the proposed legislation characterized these provisions as "the key new authorities" of the legislation. H.R. Rep. No. 92–511, 92d Cong., 1st Sess. (1971), at 21. The Senate Committee on Agriculture and Forestry Report explained that "the educational process entailed by certification provides an opportunity not only to greatly diminish the possibility of injury to persons but also injury to the environment from both misuse, and more importantly, overuse." S. Rep. No. 92–838, 92d Cong., 2d Sess. (1972), at 23.

> If, however, a pesticide [classified for restricted use] in accordance with Section 3(d) is also classified for general use for some purposes the restrictions imposed for its restricted uses are not applicable to its general uses under either this Section or Section 3(d).

H.R. Rep. No. 92–511, 92d Cong., 1st Sess. (1971), at 24–25.

The Committee Report leaves no doubt that the phrase "for some or all purposes" in section 12(a)(2)(F) was intended to modify the phrase "classified for restricted use." The fact that the phrase "classified for restricted use for some or all purposes" is set off by commas emphasizes the drafter's intent that these words be read together as a single phrase. This intent is further confirmed by the use of the term "purposes" as a synonym for "uses" in the second sentence of the quote.[13]

The Weed District's suggested interpretation of the statutory language is not only inconsistent with the foregoing legislative history but is also inconsistent with the objectives of FIFRA and with the statutory scheme for their furtherance. FIFRA and the Agency's implementing regulations are designed to assure that pesticides classified for restricted use are applied only by qualified applicators, who possess the requisite knowledge to use them safely and appropriately. EPA's implementing regulations further the statutory objective of preventing unauthorized access to RUPs, by requiring pesticide applicators to be re-certified every four years, and by requiring pesticide sellers to record an applicator's certification number and the expiration date of the certificate at the time of a sales transaction. 40 C.F.R. §§ 171.11(d) and (g). In combination, these stringent training requirements for applicators and stringent recording requirements for pesticide sellers assure that RUPs will be sold only for use by persons who have a current certification that they are qualified to handle and apply RUPs. The preamble to the regulations specifically states that one of the purposes of the Agency's recordkeeping requirements is:

> [T]o eliminate the further availability of restricted use pesticides to applicators *whose certifications have expired* and to minimize the opportunity that such a violation could occur * * *.

[13] This use of the term "purposes" to refer to the uses for which a pesticide is classified is also consistent with the use of the term "purposes" in the definition of "commercial applicator," which refers to an applicator who uses "any pesticide which is classified for restricted use for any purpose." *See* FIFRA § 2(e)(3), 7 U.S.C. § 136(e)(3). Notably, the statute's use of "purpose" and "use" as interchangeable terms also renders dubious the Weed District's proposition that the term "purpose" necessarily connotes intentional conduct.

Certification of Pesticide Applicators Recordkeeping and Reporting Requirements, Final Rule, 48 Fed. Reg. 53,972 (Nov. 29, 1983)(emphasis added).

We conclude, therefore, that the Presiding Officer properly held that an intent to violate FIFRA is not an element of a violation of section 12(a)(2)(F), and that the Weed District violated section 12(a)(2)(F) when its employee sold an RUP to an uncertified purchaser.

C. Appropriateness of Penalty

The Weed District argues, alternatively, that even if it has violated FIFRA, its violation should result in a warning, rather than a civil penalty, because the violation was "minor" rather than "serious." Appeal Brief at 8. It argues that Mr. Cronk's alleged violation was inadvertent, that he had no history of prior violations, that the sale did not cause environmental harm, and that Mr. Cronk ordinarily exercises great care to follow applicable laws and regulations. *Id.* at 9. The Weed District further argues that, if a penalty is assessed, it should be reduced because the Presiding Officer's penalty assessment is disproportionately high when compared to penalty assessments in *In re Kay Dee Veterinary Division, Kay Dee Feed Co.,* 2 E.A.D. 646 (CJO 1988), *In re Custom Chem. & Agric. Consulting, Inc.,* 2 E.A.D. 748 (CJO 1989), and *In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782 (EAB 1997). *Id.* For the reasons stated below, we reject the Weed District's arguments and affirm the Presiding Officer's penalty assessment of $2,400.

The record does not contradict the Weed District's assertion that its compliance record is unblemished and that this particular violation did not directly cause environmental harm. However, we agree with the Presiding Officer that a penalty, rather than a warning, is appropriate. The ERP states that:

> A civil penalty is the preferred enforcement remedy for most violations. A civil penalty is appropriate where the violation: (1) presents an actual or potential risk of harm to humans or the environment * * *, or would impede the Agency's ability to fulfill the goals of the statute; (2) was apparently committed as a result of ordinary negligence (as opposed to criminal negligence), inadvertence, or mistake; and the violation * * * involves a violation under the Act by any registrant, * * * wholesaler, dealer, retailer, or other distributor (no prior warning is required by FIFRA for violators in this category) * * *.

ERP at 10.

This case clearly fits within the category of cases where a civil penalty is the "preferred enforcement option," in that the violation resulted from the negligence of Mr. Cronk. More specifically, we agree with the Presiding Officer's determination that the violation was caused by Mr. Cronk's failure to exercise appropriate care in determining the expiration date of Mr. Piland's certification card. Mr. Cronk has been selling RUPs for the Weed District for 15 years, and not only should have been aware of the importance of accurately recording the expiration date on Mr. Piland's card but also should have been familiar with a variety of means to check the date if he found the card difficult to read. Mr. Cronk recorded information about the expiration date in his Rolodex file from a card that he stated was badly smudged. Yet, he did not call EPA to verify the date at the time he entered it into his Rolodex file. Nor did he keep a list of certified applicators in his office, although EPA makes such lists available on request. Tr. at 83–84. We agree with the Presiding Officer that Mr. Cronk "was negligent when he misread the badly smudged card in transferring information to the 'Rolodex' and/or when he proceeded with the sale at a time when he could not have been certain that Mr. Piland was a certified applicator." Initial Decision at 20.

We have repeatedly held that the Agency retains discretion as to when a warning may be issued instead of a penalty. *Green Thumb,* 6 E.A.D. at 799–800. In any event, we see no abuse of that discretion here, where the Presiding Officer found that Mr. Cronk failed to exercise due care. *See* FIFRA § 14(a)(4) ("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.").

Moreover, we agree with the Presiding Officer that, even though Mr. Cronk's violation may not have directly caused environmental harm, a civil penalty is appropriate for its deterrent effect where a violator, particularly a dealer, by acting negligently, undermines strict compliance and thereby weakens the fulfillment of statutory goals.[14]

[14] In arriving at his conclusion that a penalty rather than a warning was appropriate, the Presiding Officer noted that "Congress must have concluded that the risk a restricted use pesticide might be applied by a noncertified applicator would be enhanced, if sales of restricted use pesticides to persons who were not certified were permitted, other than under regulations promulgated by the Administrator." Initial Decision at 18. Thus, he considered the prospective harm to the FIFRA regulatory scheme of not penalizing "casual attitudes toward compliance." We have previously held "harm to the program alone is sufficient to support a substantial penalty." *In re Predex Corp.,* 7. E.A.D. 591, 601, (EAB 1998); *Green Thumb,* 6 E.A.D. at 800–01.

We affirm the Presiding Officer's penalty assessment of $2,400 since it is within the range prescribed by the ERP and since the Presiding Officer has provided a reasonable explanation for the penalty amount. *See In re Johnson Pac., Inc.,* 5 E.A.D. 696, 702 (EAB 1995). The Weed District's argument that the assessed penalty is disproportionately high when compared to penalty assessments in other FIFRA cases lacks merit. The cases cited by the Weed District are clearly distinguishable. In both *In re Kay Dee Feed Division, Kay Dee Feed Company,* 2 E.A.D. 646 (CJO 1988), in which the respondent was assessed a penalty of $1,200 for six pesticide sales that violated FIFRA, and *In re Custom Chem. & Agric. Consulting, Inc.,* 2 E.A.D. 748 (CJO 1989), in which the respondent was assessed a penalty of $5,500 for twenty one pesticide sales that violated FIFRA, the penalty assessments were influenced by evidence specific to the financial circumstances of the respondents in those cases, and are not relevant here. The Weed District's reliance on *In re Green Thumb Nursery, Inc.,* 6 E.A.D. 782 (EAB 1997), a more recent decision, is also misplaced because it involved a violation of a different statutory provision.

III. *CONCLUSION*

Having determined that Arapahoe County Weed District violated FIFRA § 12(a)(2)(F) as alleged in the Complaint, we uphold the assessment of a penalty of $2,400 against it in accordance with section 14(a)(1) of the Act (7 U.S.C. § 136l(a)(1)). Payment of the penalty shall be made by mailing or delivering a certified or cashier's check in the amount of $2,400 payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

Regional Hearing Clerk
U.S. EPA, Region VIII
P.O. Box 360869
Pittsburgh, PA 15251–6859

So ordered.