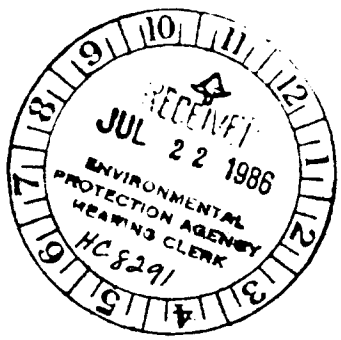
UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



IN THE MATTER OF:	
BETHUNE GRAIN, INC.,	IF&R Docket Number VIII-160C
RESPONDENT	

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT ("FIFRA" OR "THE ACT")

1. Failure of Respondent to register with United States Environmental Protection Agency as a Restricted-Use Pesticide dealer violated 40 C.F.R. 171.11(g)(1) and Section 4(a)(1) of the Act where Respondent made a Restricted-Use Pesticide available for use to another person in the State of Colorado, a state where the U.S. EPA Administrator conducts a Federal Pesticide Applicator Certification Program.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

2. Failure of Respondent, after April 25, 1984, to comply with the record-keeping requirement of 40 C.F.R. 171.11(g)(2), violated Section 4(a)(1) of the Act for the reason that said regulation and statute requires Respondent to maintain records of transactions where a restricted-use pesticide was made available for use by another.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT

3. Intent is not an element of a violation for which a civil penalty may be assessed under Section 14(a)(1) of the Act; however, lack of intent or lack of actual knowledge may be considered in determining the gravity of such violation.

APPEARANCES

For Complainant:

Teresa N. Lukas, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VIII
999 18th Street
One Denver Place, #1300
Denver, Colorado 80202-2413

For Respondent:

George Homm, Esquire
HOMM & CRIBBS
366 14th Street
Post Office Box 806
Burlington, Colorado 80807

INITIAL DECISION

By Original Complaint filed April 8, 1985, Complainant United States Environmental Protection Agency (hereinafter "EPA" or "the Agency") charges Bethune Grain, Inc. (hereinafter "Respondent" or "Bethune"), of Bethune, Colorado, in Count I of said Complaint, with violation of Section 12(a)(2)(F) and 3(d) of FIFRA (7 USC Sections 136j[a][2][F] and 136a[d]) for the reason that the manager of Respondent's facility, Charles H. Schulte, in November, 1984, applied Phostoxin, a restricted-use pesticide ("RUP") to grain stored at said facility and that at said time said Charles H. Schulte was not certified and that said application was not accomplished under the direct supervision of a certified applicator. Count II of said Complaint charges that Respondent violated 40 C.F.R. Section 171.11(c)(7) and Section 4(a)(1) of FIFRA for the reason that Respondent did not maintain any records of the said Phostoxin application as by said regulation and section required.

On November 8, 1985, Complainant's Motion to Amend its Complaint was granted. In said Amended Complaint, it is proposed that a civil penalty of $5,000 be assessed for the violation described by Count I and that $4200 be assessed for the violation set forth in Count II. Said Amended Complaint also added Counts III and IV. Count III alleges that, after Respondent purchased one case of Phostoxin pellets in December, 1983, it delivered some or all of said Phostoxin to Charles H. Schulte for use in November, 1984, on wheat owned by Schulte; that Respondent, in so making said RUP "available for use", was a RUP retail dealer who was required to register as such with EPA by June 25, 1984, and that Respondent's failure to so register as a RUP retail dealer violates 40 C.F.R. 171.11(g)(1) and Section 4(a)(1) of FIFRA, 7 U.S.C. Section 136b(a)(1), for which violation an additional civil penalty in the sum of $4200 is proposed.

Count IV charges that Respondent failed to record and maintain records of said transaction whereby a restricted-use pesticide was made available to Charles H. Schulte in violation of 40 C.F.R. 171.11(g)(2) and Section 4(a)(1) of FIFRA, 7 U.S.C. Section 136b(a)(1). For the violation charged in said Count IV, a civil penalty in the sum of $4200 is proposed.

In its posthearing brief, page 2, Complainant abandons the charges contained in said Counts I and II, reasoning (1) that Respondent "would be liable as a commercial applicator for the violations charged in Counts I and II only if it applied the subject restricted-use pesticide to grain stored in its facility . . . as a function of (Respondent's) grain storage operation"; and (2) that the instant record reflects that none of the treated grain was stored in Respondent's facility but "in nearby bins belonging to Raymond Schulte, the father of Respondent's manager", and (3) that the (treated) grain belonged to said Raymond Schulte and Ed Schulte.

Respondent, in its timely Answer filed herein, denies the factual allegations in said Counts contained.

In its brief, Respondent argues that the regulations (171.11[g]) on which the charges in Counts III and IV are based went into effect on June 25, 1984, and that the transfer or sale of subject Phostoxin, purchased in December, 1983, was "made available for use" prior to June, 1984, and immediately following its purchase by Respondent and that, therefore, there is no violation for the reason that the sale or transfer was made by Respondent before the effective date of said regulation.

An adjudicatory hearing was convened in the Kit Carson County Courthouse in Burlington, Colorado, on April 2, 1986, beginning at 9:30 a.m.

Upon consideration of the evidence adduced at the hearing, the evidence of record and the post-hearing submissions of the parties, I make the following

FINDINGS OF FACT

1. On December 3, 1984, Michael G. Bergin, an authorized EPA compliance inspector, conducted an inspection of Respondent's facility in Bethune, Colorado (Complainant [hereinafter "C"] Exhibit [hereinafter "EX"] 1 and 2; Transcript [hereinafter "TR"] 7).

2. Respondent Bethune Grain, Inc. is a closely-held corporation whose stockholders are Raymond Schulte, Henrietta Schulte and Charles Schulte (TR pp. 23, 28 and 36).

3. In December, 1983, Respondent purchased a case of Phostoxin pellets from Lystad's, Inc. (C EX 3; TR p. 18).

4. Respondent treated the purchase of Phostoxin as a corporate business expense (TR p. 19).

5. Charles Schulte, Respondent's manager, assisted by Allen Schulte, used some or all of the Phostoxin to fumigate grain belonging to Raymond Schulte and Ed Schulte in June of 1984 and in October or November of 1984 (C EX 2; TR p. 18).

6. Raymond and Ed Schulte are Charles and Allen Schulte's father and brother, respectively (TR p. 29).

7. Raymond Schulte and Ed Schulte were the owners of the subject wheat which was treated with Phostoxin (Respondent [hereinafter "R"] EX 1 and TR p. 3), and were owners of the land and bins in which the wheat was stored (R EX 2; TR pp.32, 33).

8. Charles Schulte testified that he and his brother, Allen Schulte, did not undertake to fumigate the grain as employees of Respondent, but in a private capacity as a favor to their father (TR p. 20).

9. Raymond Schulte reimbursed Respondent for the cost of the Phostoxin, which was $590, by allowing Respondent to use his tractor and other implements (TR p. 22).

10. At all times relevant to this action, Respondent was a general-use pesticide dealer licensed by the State of Colorado (TR p. 29).

11. EPA notified Respondent of new regulations affecting restricted-use pesticide dealers in Colorado, by a letter sent to all pesticide dealers in February, 1984 (C EX 4; TR p. 38).

12. Respondent did not register with EPA as a restricted-use pesticide dealer at any time before or after Charles Schulte treated the Schulte family's grain with the Phostoxin purchased by Respondent (Stipulation No. 4; TR p. 3).

13. Respondent did not maintain any record of the transaction by which it sold Phostoxin to Raymond Schulte or made the Phostoxin available to Charles Schulte for use on the Schulte family's grain (TR p. 24).

14. Charles Schulte's certification as a private applicator of restricted-use pesticides expired on March 16, 1981 (C EX 6; TR p. 15).

15. Allen Schulte was a certified private applicator in 1984 and at all times relevant to this action (C EX 6; TR p. 16).

16. Phostoxin is, and was at the time Respondent made it available for use, a pesticide classified for restricted use by the EPA (C EX 9; TR p. 10).

CONCLUSIONS OF LAW

1. Respondent corporation is a "person" within the meaning of §2(s) of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or "the Act), 7 U.S.C. §136(s), and thus is subject to regulation.

2. Complainant is authorized to file an administrative complaint for violations of FIFRA by Section 14(a) of the Act, 7 U.S.C. §136 l(a).

3. Respondent is a "restricted-use pesticide dealer" within the meaning of 40 C.F.R. §171.2(b)(1).

4. Respondent violated EPA regulations 40 C.F.R. §171.11(g)(1) and Section 4(a)(1) of FIFRA, 7 U.S.C. §136b(a)(1), by failing to register with EPA as a restricted-use pesticide dealer, i.e., by failing to report its name to the EPA Regional Office in Denver within 60 days of becoming a restricted-use pesticide dealer or within 60 days after the publication of the effective date of the regulation, whichever was later.

5. Respondent violated 40 C.F.R. §171.11(g)(2) and Section 4(a)(1) of FIFRA by failing to maintain records for each transaction by which it made Phostoxin, a restricted-use pesticide, available for use by a person or persons.

6. Complainant admits that Respondent was not a commercial applicator of a restricted-use pesticide.

7. Intent is not an element of a violation charged under the Act where the assessment of a civil penalty is sought; however, lack of intent may properly be considered in determining the gravity of such violation (Section 14[a][1] of the Act).

8. Under 40 C.F.R. 171.2(b)(2), subject Phostoxin was by the Respondent made "available for use" at the times it was actually delivered for application to subject wheat.

DISCUSSION

I find that Respondent, Bethune Grain, Inc., was a restricted-use pesticide ("RUP") dealer (§171.2[b][1]). It became such upon purchase of Phostoxin from Lystad's in 1983 with the intention that it would make said RUP "available for use" or offer to make said RUP "available for use" to another person. 40 C.F.R. 171.2(b)(2) provides:

> "The term 'make available for use' means to distribute, sell, ship, deliver for shipment, or receive and (having so received) deliver, to any person."

Respondent thus became a RUP dealer when it received said Phostoxin and thereafter made it available for use or offered it for sale or otherwise "available for use".

As a RUP dealer, Respondent had a duty under 40 C.F.R. 171.11(g)(1)(i) to "register" as such, i.e., to submit a report to EPA, Region VIII, giving its business name and address, no later than June 25, 1984. Respondent was notified of such duty in February, 1984 (C EX 4), and its failure to so comply supports the violation charged in Count III of the Complaint.

Attached to the February, 1984, notice to Respondent was a summary of the Rule, which clearly defined the terms "Restricted Use Pesticide Dealer", "Make Available for Use" and "Dealership".

The notice further set forth "Recordkeeping Requirements", stating, in accordance with §171.11(g)(2):

> "Each (RUP) dealer is required to maintain for a period of two years records of the sale or distribution of each restricted use pesticide . . . to certified applicators or to non-certified applicators." 1/

1/ It is apparent on this record that the "sale" of Phostoxin (RUP) was made to persons who were not certified applicators and who did not contemplate that the application of said RUP would be made under the supervision of an individual certified to use or supervise the use of Phostoxin (§171.2[a][8]). The pleadings and the record do not address this violation.

Respondent was there cautioned to read carefully the entire Federal Register notice and to contact EPA, Region VIII, if it had any questions.

On the evidence, the recordkeeping requirement of 40 C.F.R. 171.11(g)(2) was not by the Respondent complied with, supporting the charge made by Count IV of the Complaint. Respondent, in its Brief, argues it is not an RUP dealer subject to the regulation.

Respondent theorizes that subject Phostoxin was made "available for use" on the date of its purchase by Respondent and that, since the date of purchase antedated the effective date of 40 C.F.R. 171.11(g), Respondent is not subject to the regulation. This argument is rejected for the reason that:

1. Respondent became a restricted-use dealer, as demonstrated, supra., from and after whatever date it procured said Phostoxin for the purpose of making it "available for use" to another person (Section 171.2[b][1]), and

2. Said Phostoxin was actually made "available for use" only at the time it was delivered to Schulte to be applied to subject grain (§171.2[b][2]). Webster defines "deliver" as "to give up or surrender" or to "give into another's possession or keeping". Before its "delivery", for application, in June, 1984, and in October, 1984, Respondent conceivably was free to make said RUP available to any customer having the desire and qualifications to purchase it. On this record, there is no showing that said RUP was delivered to Schulte prior to the times of application.

As stated in Harmack Grain Co., Inc., Docket No. IF&R VIII-150C (May 2, 1986), the FIFRA Act is primarily a recordkeeping and reporting statute. Accurate and timely reporting is necessary so that EPA may alert (the public to) any unreasonable adverse effects to human health and the environment which a pesticide may be discovered to cause. Requiring dealers

to specifically give notice that they are making RUPS "available for use" is necessary to enable EPA to determine with certainty what pesticides are being used, and by whom, so as to effectively regulate the sale and use of such toxic substances. We have often pointed out that such regulatory provisions exist for the protection of the public and, for that reason, are liberally construed and broadly interpreted to effectuate the purposes of the Act (see Tcherepin v. Knight, 389 US 332, 88 S.Ct. 548 [1967]).

A civil penalty is assessed hereinbelow, considering the factors provided in the guidelines and the facts and circumstances here attendant.

CIVIL PENALTY

In determining the amount of an appropriate civil penalty here to be assessed, we are governed by the rules of practice, 40 C.F.R. Part 22. Section 22.27(c) provides:

> "If the Presiding Officer determines that a violation has occurred, (he) shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of the civil penalty, and must consider the civil penalty guidelines issued under the Act. If (he) decides to assess a penalty different in amount from the penalty recommended to be assessed in the Complaint, (he) shall set forth in the initial decision the specific reasons for the increase or decrease . . ."

Section 22.35(c) provides further that there shall be considered, in addition to the criteria listed in 14(a)(4) of the Act, (1) Respondent's history of compliance with the Act . . . and (2) any evidence of good faith or lack thereof.

The Act provides, Section 14(a)(4), 7 U.S.C. Section 136 l(a)(4):

> "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 of the person's ability to continue in business, and the gravity of the violation . . ."

30 Federal Register, No. 148, Wednesday, July 31, 1974 (Guidelines for Assessment of Civil Penalties Under Section 14[a] of FIFRA), at pages 27711 and 27712, states that the Assessment Schedule categorizes potential violations on the basis of (1) the gravity of the violation and (2) the size of the business of the person charged, and that graduated penalties are set out in a matrix (using) these two factors.

Harmack, supra., published May 2, 1986, states, l.c. 6:

> "Since the regulation in question, 40 C.F.R. 171.11(g)(1) ('Pesticide Dealer Reporting Requirements') was not promulgated until November 29, 1983, the Agency has not yet developed a penalty matrix for the regulation. Complainant has analogized between Respondent's violation, failure to register as a restricted use pesticide dealer, and the penalty which would be assessed against a producer establishment that similarly failed to register with EPA. In assessing this penalty, Complainant used the Charge Code 'E 33' in the penalty guidelines . . . " (See 39 FR 27717.)

Complainant here has used the same guidelines 2/ for proposing penalties, each in the amount of $4200, for each of the violations alleged in Counts III and IV of subject Complaint, i.e., failure to register as a RUP dealer and failure to keep records of RUPs made available (40 C.F.R. 171.11[g][1] and [2]).

Complainant's witness (TR 43) concluded from Complainant's Exhibit No. 4 that Respondent had knowledge of the registration requirement and, therefore, was subject to the assessment of a civil penalty. Said Exhibit is an undated notice sent in February, 1984, to all pesticide dealers licensed by the State of Colorado to deal in pesticides (TR 38). Said notice generally set forth

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2/ Complainant's witness (TR 41) purported to use "Interim Penalty Guidelines" issued by EPA Headquarters, June 11, 1981 (C EX 10). As stated on page 1 thereof, they do not represent a major departure from the use of the (July 31, 1974) guidelines in determining an appropriate civil penalty.

the duties required of persons who sell or distribute RUPs in (Colorado). It stated also that:

> "This rule does not apply to pesticide dealers who sell or distribute only general use pesticides. However, if a pesticide applicator also acts as a restricted use pesticide dealer, he must register with EPA."

The succeeding paragraph advises that the effective date of said rule was estimated to be some six weeks later, March 15, 1984. 3/ Following the subject notice was a three-page summary of "Restricted Use Pesticide Dealer Recordkeeping and Requirements", containing the definitions of "Restricted Use Pesticide Dealer" and other definitions as set forth in 40 C.F.R. 171.2(b).

I have also considered Section I (C)(1)(a) of subject Guidelines, 30 FR 27711, 27712, which states:

> " . . . The gravity of the 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) the identity of the persons exposed . . . ; (5) the extent to which . . . the Act was in fact violated; (6) the particular person's history of compliance and actual knowledge of the Act; and (7) evidence of good faith in the instant circumstance."

It is not questioned that factors (1) and (2) indicate that, as Phostoxin is a restricted-use pesticide, the gravity of the violation is very high. Its label (C EX 9) warns that, when moist, Phostoxin releases gas that is poisonous if inhaled or swallowed. The label prominently exhibits the "skull and crossbones" and the warning: "Danger - Poison". As to factors (3), (4) and (5), said Phostoxin "pellets" were applied to bug-infested wheat at least two to three times by Charles Schulte, who was once licensed by the State of Colorado as a private applicator (but which license expired in 1981),

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3/ The effective date of said rule was April 25, 1984.

assisted by Allen Schulte, who holds a current private applicator license from the State of Colorado (TR 30).

As to factor (6), I find the violation, if not an isolated instance, was an infrequent one, distinguishable from Respondent's usual practice of acting as a dealer, licensed by the State of Colorado, for the sale and distribution only of "general use pesticides". While the notice of February 4, 1984 (C EX 4), constructively imparts notice of its content, it was sent to all dealers licensed by the State of Colorado without regard to whether they had a history of, or anticipated the prospect of, selling and distributing RUPs, and stated unequivocably that "the rule" does not apply to pesticide dealers who sell or distribute only general use pesticides. In the premises, I find that, on this record, actual notice to the Respondent was deficient if not wholly lacking.

Respondent, as stated hereinabove, is a small family corporation which actually most recently experienced a net loss from its operation and whose volume of business consists, in the main, of buying and selling grain, which sales yield a very small margin (TR 49). Charles Schulte (hereinafter "Charles") manages the operation and owns stock in Respondent along with his parents, Raymond and Henrietta Schulte. They are the only stockholders (TR 28; 36). The Respondent's practice usually was to hire certified commercial applicators to treat wheat stored in their bins (TR 36); in this instance, the bug infestation was noted in an A.S.C.S. check (TR 30) of wheat owned by the Schulte family, which was stored in bins owned by individual family members and not by Respondent, and situated on land which was also owned by such individual members (TR 29). Charles testified that the Phostoxin, while purchased by the corporation (Respondent), was obtained

for the purpose of treating the "family" grain, to be applied to grain stored "under a loan" (TR 33). Charles, at the time of the EPA inspection in December, 1984 (TR 7), told the EPA inspector that Respondent did not sell RUPs but, prior to departure by said inspector, voluntarily revealed that he had applied Phostoxin tablets to said family wheat (TR 13). In the premises, I find that Charles sincerely believed that Respondent did not sell (or make "available for use") RUPs, and that the notice which Respondent ostensibly received in February, 1984, did not then dispel such belief and, consequently, did not serve to impart actual notice to Respondent of its mandatory duties, as a RUP dealer, to register and keep records of any RUP sold or distributed by it, as provided by regulation.

It can now be confidently stated that Respondent, as well as its management and stockholders, has been fully apprised of the duties attendant to acting as a Restricted Use Pesticide dealer in the State of Colorado, as that term is defined in 40 C.F.R. 171.2. Respondent is hereby directed to instruct its employees and management to study and fully comply with the Registration and Recordkeeping provisions of 40 C.F.R. 171.11, to wit:

(1) Respondent has a duty to register as a RUP dealer in accordance with 171.11(g)(1);

(2) Respondent has a duty to keep records of all sales of RUPs in accordance with 171.11(g)(2);

(3) Sales of RUPs to certified applicators should be recorded and records maintained, as provided by 171.11(g)(2), and

(4) It should be recognized that the provisions in the regulations for sales of RUPs in Colorado to uncertified persons for use by a certified

applicator are governed by the provisions of 171.11(g)(2)(ii), operative April 25, 1985 et seq., which require that records be made and kept of each such transaction, describing the pesticide delivered and fully identifying the certified applicator by certification number as well as name and address, and that such records be retained for 24 months after the date of any such transaction. See Tierra Verde Co., Inc., Docket No. FIFRA-09-0422-C-85-1 (Dec., 1985), discussing the implementation of such EPA plan which is here applicable.

We have repeatedly held that intent is not an element of the violation charged (Section 14[a] of the Act), but that lack of intent may be considered in determining the gravity of such violation.

For the reasons above stated, I find that an appropriate civil penalty which should be assessed for Respondent's failure to register on or before June 25, 1984, as a Restricted Use Pesticide dealer is the sum of $900, and that an appropriate penalty for Respondent's failure to comply with the recordkeeping requirements of 40 C.F.R. 171.11(g)(2) is the sum of $900 (see Harmack Grain Co., Inc., Docket No. IF&R VIII-150C, supra.)

On the basis of the entire record before me, I find that a civil penalty in the total sum of $1800 should be and it is hereby proposed to be assessed against Respondent.

ORDER 4/

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a)(1), 7 U.S.C. 136 l (a)(1), a civil penalty of $1800.00 is assessed against Bethune Grain, Inc., for the violations of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the Service of the Final Order upon Respondent by forwarding a Cashier's check or Certified Check payable to the Treasurer, United States of America, to:

Mellon Bank
EPA - Region 8
(Regional Hearing Clerk)
Post Office Box 360859M
Pittsburgh, Pennsylvania 15251.

It is so ORDERED.

DATED: July 18, 1986

Marvin E. Jones
Administrative Law Judge

4/ Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the Final Order of the Administrator (see 40 C.F.R. 22.27[c]).

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 C.F.R. 22.27(a), I have this date forwarded to Ms. Jo Lynn Meacham, Regional Hearing Clerk of Region VIII, U.S. Environmental Protection Agency, 999 18th Street, One Denver Place, #1300, Denver, Colorado 80202-2413, the Original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, 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 the Hearing Clerk, EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATE: July 18, 1986

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ