8/17/84

COPY

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

FILED

AUG 21 1984

ENVIRONMENTAL PROTECTION AGENCY
REGION IX
HEARING CLERK

IN THE MATTER OF	)	Docket No. IFR-9-328C
	)	
SINGLETON SPRAY SERVICE, CO.,	)	
	)	
ET AL.,	)	
	)	
Respondents	)	

84 AUG 23 P2:38

1. Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") A pesticide, classified by the Administrator of the United States Environmental Protection Agency ("U.S. EPA") for restricted use, on determination that said pesticide presents a hazard to the applicator or other persons, must, under Section 3(d) of FIFRA ("the Act"), be applied only by or under the direct supervision of an applicator certified pursuant to Section 4 of the Act.

2. FIFRA - Where applications of pesticides are made by non-certified applicators, such applications must be made "under the direct supervision of a certified applicator", as said quoted phrase is defined by Section 2(e)(4) of the Act, and pursuant to the standards set forth in pertinent regulations including, specifically, 40 CFR 171.6.

3. FIFRA - When, in 1981, a certified applicator was retained by a non-certified applicator but furnished no direct supervision with respect to admitted applications of restricted-use pesticides by said non-certified applicator, said applications were made in violation of the Act.

4. FIFRA - Under the Rules and Regulations governing the Administrative Assessment of Civil Penalties, 40 CFR 22.24, where Complainant failed to prove, by a preponderance of the evidence, that a violation occurred as set forth in Count II of the Complaint, said Count II should be and was dismissed.

Appearances

For Respondent: Robert J. Welliever, Attorney
Johnson, Welliever, Buckley & Otto
1833 North Third Street
Phoenix, Arizona 85004

For Complainant: David M. Jones, Esquire
Office of Regional Counsel
U.S. EPA, Region IX
215 Fremont Street
San Francisco, California 94105

INITIAL DECISION

On May 10, 1983, subject Complaint was filed by the Director of the Toxics and Waste Management Division of Region 9, United States Environmental Protection Agency (hereinafter "EPA" or "Complainant"), in two counts, charging the named Respondents, Singleton Spray Service Company, a South Dakota corporation, and Thomas T. Singleton and Esther Singleton, individuals, with violation of Section 12 of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or "the Act"), 7 USC 136 et seq.

Count I charges that Respondents, during the months of July through October, 1981, violated Sections 12(a)(2)(F) and 12(a)(2)(G) of FIFRA when, in approximately 400 instances, registered pesticides, classified for restricted use by EPA, were applied, for the reason that such applications of said restricted-use pesticides were not then applied by a certified applicator, nor applied under the direct supervision of a certified applicator. For said violations alleged by Count I of the Complaint, Complainant proposes the assessment of civil penalties in the total sum of $22,000.

Count II of said Complaint charges that Respondents and their employees, acting within the scope of their employment, dumped unused pesticides in an open area, located near the Casa Grande (Arizona) Airport, in violation of Section 12(a)(2)(G) of the Act, 7 USC 136j(a)(2)(G). For said violation alleged in Count II of subject Complaint, Complainant proposes the assessment of additional civil penalties totaling $2750.

Complainant further alleges that said sums are appropriate as civil penalties on this record because said amounts bear a relationship to the financial condition of Respondents while considering the gravity of the violations charged and the culpability of the Respondents so alleged.

Respondents, by joint Answer timely filed on May 24, 1983, deny the violations charged and pray that said Complaint be dismissed.

On November 30, 1983, the adjudicatory hearing requested by Respondent convened in the Courtroom, Room 8413, Federal Building, 230 North First Avenue, Phoenix, Arizona. Said hearing continued through November 30, 1983, and into December 1, 1983, and then recessed until said hearing again resumed on April 25, 1984, and the record herein was finally submitted.

On the basis of testimony elicited at both sessions of 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 by the respective parties, I make the following:

FINDINGS OF FACT

1. Respondent, Singleton Spray Service, Co., is a South Dakota corporation, and is a person as defined in Section 2(s) of FIFRA (7 USC §136[s]).

2. Thomas T. Singleton (also Tom Singleton) and Esther Singleton are the principal stockholders and management of Singleton Spray Service, Co.

3. Singleton Spray Service, Co., owns and operates a commercial spraying operation from which pesticides, as defined in Section 2(u) of FIFRA (7 USC §136[u]), are applied.

4. Singleton Spray Service, Co., conducts its commercial spraying operations in the States of Arizona and South Dakota and in the Republic of Canada, and conducted subject commercial spraying operations in the State of Arizona during the 1981 spraying season (Transcript [hereinafter "T."] 36).

5. Singleton Spray Service, Co., in the conduct of its commercial spraying operation in the State of Arizona during the 1981 spraying season, applied pesticides, on approximately four hundred different occasions, which were classified, because they are highly toxic, for restricted use under Section 3(d)(1)(C)(i) of FIFRA (7 USC §136a [d][1][C][i]). (Complainant [hereinafter "Cp"] Exhibit [hereinafter "Ex.] 1; T. 36; 73.)

6. Respondent Thomas T. Singleton, though certified in 1983, was not a certified applicator during the subject period in 1981.

7. Michael Finger was General Manager for Respondents during 1979 and 1980 and during that time was certified as a certified commercial applicator (T. 115).

8. It is stipulated by the parties that the State of Arizona plan for the regulation of custom applicators requires that they file a document, R3-10-80, entitled "Pesticide Use/Recommendation Instructions", which reflects the date of each application made; states the name of the grower, the advisor and the custom applicator, and contains the certification of the licensed custom applicator that the pesticide used by him was applied in accordance with the recommendation or instructions received by him in accordance with the Arizona statute and regulation (T. 38).

9. Said Document R3-10-80 also requires that the certification number of a certified commercial applicator appear thereon where appropriate (T. 39); however, on said documents filed by Respondent in 1981 with the Arizona Board of Pesticide Control, Custom Applicator License No. 54, signifying Singleton Spray Service, appeared in the space where the certification number of a certified commercial applicator was required (T. 39; 46; 61; 62; 80.)

10. During 1981, Finger agreed to be available to Respondents as a certified commercial applicator on an on-call, as-needed basis (T. 115).

11. During the spray season of 1981, Finger did not know how many applications of restricted-use pesticides were made by Respondents and did not see any of the R3-10-80's completed by Respondents (T. 115).

12. Finger was not called upon during said 1981 season in his capacity as a certified commercial applicator (T. 116); he was then employed by Security Savings and Loan Association, lived in Tempe, Arizona, and was not physically present in Casa Grande, Arizona, during the period that subject applications were made by Respondents; he does not know how many applications were then made nor who procured and paid for chemicals then so applied (T. 114; 115; 117).

13. In 1980, Finger, in his capacity as General Manager for Respondents, worked full-time, serving as a certified commercial applicator which included duties of occasionally assisting with the mixing and loading of pesticides (Respondent [hereinafter "R"] Brief, page 2).

14. In 1981, Finger agreed to serve in a consulting capacity as Respondents' certified applicator, which service contemplated that he would be available for on-site or off-site consultation when needed, and was paid a retainer by Respondent (R. Brief, p. 3).

15. Respondent Thomas Singleton and his chief pilot, Al R. Homestead, 1/ both received licenses as certified applicators for the years subsequent to 1981 (R Brief, p. 3), and received instruction from Finger during 1980 (T. 120).

16. In 1981, Finger was not physically present at Respondents' spraying operation at Casa Grande and he did not oversee, direct, supervise or control Respondents' operation there. Although, in 1981, he received telephone calls respecting other facets of Respondents' operation, he was not then consulted about, nor asked to oversee or supervise, the preparation, mixing or application of subject restricted-use pesticides (T. 116; 117.)

17. In 1981, Finger resided in Tempe, Arizona, and discontinued the maintenance of an apartment in Casa Grande, Arizona, which is a 30 to 45 minute drive, by automobile, from Tempe.

18. Homestead and Mike Finger are good friends. Finger came to the Respondents' operation with some regularity - to "hang around," watch and visit. His visits were social in nature and there was not any professional significance to such visits (Second volume [hereinafter "II"] of T. 136).

1/ The spelling used herein is that used in the Transcript. Respondent's Brief refers to the witness as "Major Holmstead."

19. Homestead and Tom Singleton, in Homestead's opinion, are more knowledgeable and experienced than Finger in the handling of pesticides; there was, thus, no occasion when they would then have had a need to consult Finger (II T. 154), even though Finger was available for consultation by telephone (II T. 155).

20. A certified commercial applicator is considered to be qualified to advise on the mixing of chemicals and pesticides, determine the dangers and precautions pertinent to their handling and what practices are acceptable and unacceptable under directions contained on the label (T. 121).

21. A certified commercial applicator is considered to be qualified, and is designated by statute, to make the determination whether the person or persons making a particular application of a restricted-use pesticide is a competent person to follow and comply with his instructions and supervision regarding the handling, application and use of such pesticide (7 USC §136[e][4]).

22. On or about August 20, 1981 (T. 86), and in December, 1981 (T. 93), employees of the Arizona Commission of Agriculture, at the instance of the Administrator of the Arizona Board of Pesticide Control, conducted an investigation into Respondents' practices at its custom application operation, at or near the Casa Grande Airport. Soil samples taken on or about said date, when analyzed by the State Agricultural Lab, revealed the presence of restricted-use pesticides (C Ex. 2) at a site within 1/4 mile of the Casa Grande Airport (T. 87).

23. Glen P. Ryan was an employee of Respondents for a period of about two months, from July 1, 1981, to the first week of September, 1981 (T. 146).

24. Ryan testified along with his wife, Joanne Ryan (T. 219; 229), that, on several dates throughout his two-month period of employment by Respondent, pesticides were dumped in a dry wash (like an old creek bed) just south of a taxiway strip, less than 1/4 mile from the runway used by Respondent (T. 152-155).

25. Ryan testified that, in one instance, pesticides, which had been sitting for several days in a trailer, were clabbered to the point they were useless for spraying and he dumped them in said dry wash (T. 152). "Clabbered" meant the mixture would not pump through the spray nozzle (T. 185).

26. Ryan testified that he "believes" that he was instructed to dump the pesticide by Brett Singleton (the now-deceased son of Tom Singleton) but is not positive who verbally told him to dump the pesticide (T. 181).

27. Ryan testified that on two other occasions varying quantities (sometimes 200 to 300 gallons) of pesticides were dumped on said dry wash (T. 154). The chemicals stated to have been dumped were basically parathion and water from a tank, the capacity of which was estimated to be 500 gallons (T. 179). A previous statement by Ryan was that "it was too thick--I could only get a little out" (T. 188).

28. Ryan had heard of instances where pilots, other than Respondent, in an emergency, had dropped pesticides at or near the said dry wash (T. 156).

29. Ryan and his wife experienced strained relations with Respondents Tom and Esther Singleton prior to Ryan's departure from said employment (T. 165; 225).

30. Ryan admitted that he is subject to "exaggeration" when not under oath (T. 192).

31. Joanne Ryan stated that, in one instance, she and her husband took empty chemical cans to the dump in Casa Grande. A sign on the fence at the dump stated that chemical cans must be thoroughly rinsed before dumping. Her concern, because of the activities at the airport, led her to go to an attorney (T. 218).

32. Joanne Ryan was implicated but once in dumping (T. 218) when she and her husband dumped cans at the city or county landfill (T. 219-220). Glen Ryan, her husband, had told her he dumped chemicals he "said were dangerous" so she was concerned "for him" (T. 218).

33. Mrs. Ryan also testified she saw where the chemicals were dumped "outside the wash behind the airport." Her testimony describing the location where the claimed dumping occurred did not agree with the location fixed by Glen Ryan (T. 233).

34. Mrs. Ryan did not know the identity of the material she saw dumped by her husband (T. 235), but she understood that materials she saw dumped were "chemicals" (T. 236).

35. At the time the Ryans covertly left their employment in September, 1981, they were fearful of what the Singletons might do if they knew the Ryans went to the police (T. 236).

36. Respondent, Tom Singleton, speculated that pilots unknown to him may have been required to dump unused pesticides in an emergency such as being unable, with the load, to clear power lines in the vicinity of the alleged dumping cite (II T. 79), on take-off; but that he, nor any employee at his direction, did not, at any time, dump unused pesticides, as claimed by Ryan, at any site near the airport in Casa Grande (II T. 4).

37. FUNDAL comes in powder form in a water-soluble bag. It is dropped in the tank, the tank is shut and circulation dissolves the powder and the water-soluble bag (II T. 14).

38. Respondents had and now have a "can crusher" to crush all cans (II T. 15).

39. In 1981, Respondents' gross income was $600,000. In the ensuing two years, it grossed around $150,000. The decrease in business is attributed, by Respondents, to bad publicity (II T. 27), the PIK program and fewer insects (II T. 28; 29).

40. Immediately prior to the hearing session on April 25, 1984, Respondent Tom Singleton had been crop dusting in South Dakota, which his Counsel typified as an operation bringing in thousands of dollars each day (II T. 71).

41. Singleton testified that if methyl parathion was clabbered, as testified by Ryan, it would not be possible to drain the tank by simple gravity feed (II T. 6) and the opening on Singleton's "mix trailer" is not big enough to facilitate anyone to reach in and dig out clabbered material (II T. 6; 103-105).

42. Singleton testified that clabbered pesticides had always been gotten back "into suspension" (out of its clabbered state) by mixing in "Sponto" or by the addition of water (II T. 7; 103).

43. The quantity of chemicals reported dumped by Ryan represents a substantial financial outlay (II T. 8; 102).

44. The chemicals used by Respondents are not Respondents' property, but the property of the farmer who employs Respondents; farmers deliver same to the airstrip and Respondents then do the mixing and spraying (II T. 8).

45. In the past 10 years, it is estimated that at least 10 other aerial sprayers or applicators have used Casa Grande Airport as a base to apply chemicals, and other operators, besides Singleton, are there permanently based (II T. 9; 85).

46. Contrary to Ryan's testimony, Respondents always furnished their employees with safety equipment such as gloves, rubber boots and respirators, and instructed employees with documents and a movie as to the use and necessity of same (II T. 10; 100; 114-114; 124).

47. James Allen, an Air Frame and Power Plant mechanic, testified that he had worked for Respondent Singleton for eight years and had never heard of Respondent telling anyone to dump chemicals anywhere (II T. 87).

48. Allen watched Ryan (in 1981) mix a hopper full of Lanate (in soluble plastic bags). Ryan took the chemicals out of the boxes, dropped them in the hopper and then walked into the hangar, where Allen was, and said he was sick. Ryan was wearing all his safety equipment and Allen remarked "It is impossible you could get poisoned that quick" (II T. 93-94).

49. Al R. Homestead, chief agricultural pilot for Respondent at all pertinent times herein, states he has never, in the six years of his employment with Respondents, known Tom Singleton to authorize or order any employee to dump unused pesticides anywhere (II T. 101).

50. Homestead has managed the operation in the absence of Tom Singleton and, because of his knowledge of the operation, feels it unlikely any such order or authority to dump unused pesticides was given by Singleton (II T. 102).

51. Parathion does clabber occasionally, but generally it can be brought back into suspension. Homestead has not, in his experience, been unable to get a mixture "unclabbered" (II T. 103).

52. It is unlikely that the amount of chemicals allegedly dumped would have been clabbered without Homestead's knowledge and without causing an instant shortage (II T. 104).

53. Parathion is generally relatively easy to get and keep in suspension. Galecron or Fundal powders are usually the basis of any clabbering problem (II T. 108).

54. Homestead observed Ryan during his employment and found Ryan to be fundamentally incompetent and inattentive: Ryan, on two occasions, uncoupled a hose when the valve was not shut off; he would fill another tank when intending to fill an airplane due to selecting the wrong valve. Though reminded regularly, Ryan required specific and direct supervision (II T. 110-111).

55. Homestead also witnessed Ryan helping "load" powdered Lanate which comes in soluble bags and is put in water where it goes into solution. After loading some of the material, Ryan said he was sick; Homestead thought the time involved was too short for Ryan to have developed or generated symptoms of organic phosphate poisoning. Homestead had previously, around 1981, witnessed poisoning when another employee spilled chemical on the front of his clothing and did not immediately remove his clothing (II T. 129-130).

Conclusions of Law

1. The admitted applications by Respondents of restricted-use pesticides, in 1981, were made by non-certified applicators not then acting under the direct supervision of Mike Finger or any other certified applicator, as required by Section 3(d)(1)(C)(i) of FIFRA.

2. The supervision and "control" to be exercised by a certified applicator, when restricted-use pesticides are applied by non-certified applicators under his direct supervision, include:

(A) The determination by him that the non-certified applicators are competent persons to perform under his said direct supervision;

(B) Giving to said persons verifiable instructions providing detailed guidance for applying said pesticide properly;

(C) The determination, by him, whether his physical presence is required at the time and place of application and, on determining, if so, that his presence is not required, to make provisions facilitating contact with him should his presence become necessary to assure proper application of said pesticide, and

(D) The maintenance of oversight of the operation from the outset to completion thereof, being at all times aware of the hazards presented by the situation.

3. Complainant failed to prove, by a preponderance of the evidence, that the violation occured as set forth in Count II of subject Complaint, and therefore said Count II should be dismissed with prejudice.

Discussion

Count I charges that Respondents violated the Act, Section 12(a)(2)(F), when they applied restricted-use pesticides at times when Respondents, and those employed by them, were not certified as certified applicators and when said applications were not made by persons acting under the instructions and control of a certified applicator. Respondents admit that 400 applications, more or less, of restricted-use pesticides were made by persons not then certified as certified applicators; however, their contention is that said applications were made under the instructions and control of one Mike Finger, a certified applicator.

Section 3(d)(1)(C)(i) of FIFRA provides, in pertinent part, that if the Administrator classifies a pesticide . . . for restricted use . . . "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.)

Section 2(e) of FIFRA provides, in pertinent part, the following definitions:

> (e)
>
> (1) Certified Applicator. - the term "certified applicator" means any individual who is certified . . . as authorized to use or supervise the use of any pesticide which is classified for restricted use.
>
> * * *
>
> (4) Under the direct supervision of a certified applicator. - . . . a pesticide shall be considered to be applied under the direct supervision of a certified applicator if it is applied by a competent person acting under the instructions and control of a certified applicator who is available if and when needed, even though such certified applicator is not physically present at the time and place the pesticide is applied. (Emphasis supplied.)

40 CFR 171.6(a) states, in pertinent part:

> "The availability of the certified applicator must be directly related to the hazard of the situation. In many situations, where the certified applicator is not required to be physically present, 'direct supervision' shall include verifiable instruction to the competent person, as follows: (1) Detailed guidance for applying the pesticide properly, and (2) provisions for contacting the certified applicator in the event he is needed. In other situations, and as required by the label, the actual physical presence of a certified applicator may be required when application is made by a noncertified applicator." (Emphasis supplied.)

On this record, I find that Respondents' applications of said restricted-use pesticides clearly violated the Act and regulations in the particulars alleged. While the admitted applications were ostensibly made by competent persons, they were not then "acting under the instructions and control" of Mike Finger, admitted to be a certified applicator. The Act and regulations recognize that there are situations when the hazard presented does not require the presence of a certified applicator in all instances "at the time and place the pesticide is applied" (Section 2[e][4]). In other situations, the actual physical presence of a certified applicator may be required when application is made by a non-certified applicator (40 CFR 171.6). The cited regulation makes it clear that the certified applicator decides when he is required to be present. It states that his availability must be directly related to the hazard of the situation; and further provides for "direct supervision" in those situations "where (he) is not required to be physically present". Such supervision shall include verifiable instruction to the competent

person, as set out in said regulation. The Act (§2[e][4]) provides that the non-certified applicator, deemed to be competent by the certified applicator, must act under the instructions and control of the certified applicator.

"Control" is defined 2/ as the exercise of a restraining, directing or regulating influence; or supervision which involves careful watching and responsible care.

The purpose of subject legislation should be apparent: to assure that only persons who are knowledgeable concerning the character of chemicals, and the potential hazards present, use or supervise the use of pesticides classified for restricted use. A statute should be read in a manner which effectuates rather than frustrates the major purpose of legislation - a comprehensive regulatory purpose (Shapiro v. U.S., 335 US 1 [1948]).

A remedial statute is liberally construed to further its life in advancing the remedy and striking down the mischief aimed at - the need and occasion of the law, the mischief felt and the object and remedy in view being the cardinal elements in statutory interpretation (Bents v. Maher, 128 F.2d 247, 252[3][1943]). A familiar canon of statutory contruction is that remedial legislation should be construed broadly to effectuate its purposes and that it should be liberally interpreted to achieve Congressional intent (Tcherepin v. Knight, 389 U.S. 332, 88 S.Ct 548 [1967]; Cattlemen's Inv. Co. v. Fears, 343 FS 1248, 1251 [1972]).

2/ Webster's New Collegiate Dictionary (G. & C. Merriam Co., 1979).

It is clear that the inquiry here is confined to the determination of whether the said 400 applications by Respondents of restricted-use pesticides, in 1981, were made by a certified applicator or by competent persons "acting under the instructions, supervision and control of a certified applicator." It is admitted by Respondents that the applications were made and that the persons so applying the restricted-use pesticides were not certified applicators. The record further establishes that Mike Finger, a certified applicator, did not, in 1981, "instruct" or "control" the persons making said applications. (See specifically Findings 16, 17, 18 and 19, pages 7-8, supra.) The determination here to be made is not whether Respondent Tom Singleton and his employee, Al Homestead, are as knowledgeable or more knowledgeable than Mike Finger. That is a matter which, under the statute and regulations, must be determined by the certifying authority. Thus, the opinion of Homestead or the apparent belief of Singleton that they were, in 1981, better qualified than Finger only substantiates the proven fact that the services of Finger, a certified applicator, to instruct and control those persons who then made subject pesticide applications, were not utilized. On this record, the retention of Finger in 1981, in a consulting capacity, was but an effort to circumvent statutory and regulatory requirements.

It must be understood that Congress makes the law and that its purpose in passing the legislation here pertinent is to protect the public health and the environment. The administration of the law and the promulgation of regulations pursuant to the law are powers delegated to the Administrator of the U.S. EPA, and to him alone. Both the law and the regulations recognize the

hazards inherent in the application of pesticides classified for restricted use. To facilitate the use of said pesticide, with minimum risk to the public, the statutes provide that only certain persons - certified as being knowledgeable and competent - may use or supervise the use of them. As above pointed out, even where the certified applicator may deem that his presence may not be required at the time and place of application, verifiable instruction must be given by the certified applicator to persons making the application (who the certified applicator deems to be competent to follow his instructions). In other instances, the regulation contemplates that the certified applicator will consider his presence is required and essential (40 CFR 171.6).

In the premises, I find that the Respondents violated the Act as charged in that the admitted applications of restricted-use pesticides were made by non-certified applicators not acting under the control and supervision of a certified applicator and that an appropriate civil penalty should be assessed.

Count II charges that Respondents and their employees, acting within the scope of their employment, dumped unused pesticides in an open area located near the Casa Grande Airport. On this record, I find that Complainant has not sustained its burden of proving by a preponderance of the evidence that the violation occurred as set forth in the Complaint (40 CFR 22.24). The testimony of witnesses Glen Ryan and Joanne Ryan is speculative as to the time and place of the alleged dumping and also as to the character of the substance allegedly dumped, except that it was clabbered. Further, their testimony leaves to surmise whether

the alleged dumping was authorized by Respondents and the identity and authority of the person or persons who actually gave the dumping instructions, as claimed (see, specifically, Findings 23, 24, 25, 26, 27, 31, 32, 33 and 34).

The Ryan testimony is less credible due to the fact that it is evident that their actions in contacting the authorities and instigating an investigation into Respondents' operation was motivated by "strained relations" with Respondents (see specifically Findings 29 and 35). Whereas some evidence was presented by Complainant that soil samples indicated the presence of chemicals used as pesticides in operations such as that of the Respondents, the evidence further indicates that the presence of the chemicals was possibly attributable to persons other than the Respondents (see, specifically, Findings 28, 36 and 45). More importantly, Respondents presented evidence that the claimed dumping was unlikely because:

1. The quantity of chemicals allegedly dumped:

(A) Represents a substantial monetary outlay (Finding 43);

(B) Is the property of the employing farmer (Findings 44), and

(C) Would have, if dumped, caused an apparent and instant shortage (Findings 47 and 52).

Further, both Tom Singleton and Homestead testified that they had always succeeded in getting clabbered pesticides out of its clabbered state by the use of "Sponto" and/or the addition of water (Findings 42 and 51); and there was no evidence that Respondents had at any time, before or subsequent to the employment of Glen Ryan, ever dumped clabbered pesticides (Findings 47 and 50).

In the premises, I do not find that the allegations of Count II of the Complaint are supported by a preponderance of the evidence in the record, and therefore propose that Count II be dismissed with prejudice.

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 the 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 CFR 22.35(c) provides:

> (c) Evaluation of Proposed Civil Penalty. - In determining the dollar amount of the recommended civil penalty assessed in the intial decision, the Presiding Officer shall consider, in addition to the criteria listed in section 14(a)(3) 3/ 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.

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

The Complainant proposes the assessment of a civil penalty of $22,000 and, citing the subject provisions of the Act and Regulations, states that Respondents' gross sales were in the range of $400,000 to $700,000 per annum. The amount of penalty proposed greatly reduces the amount indicated by the "Guidelines" (30 FR 27722 et seq.), and purports to be an amount selected which bears "a rational relationship to the Respondents' financial condition and to the relative gravity of the violations and Respondents' culpability in committing them."

We have observed, in previous decisions, that intent to violate is not a factor 4/ to be determined in establishing the violation charged. However, lack of intent can, under appropriate circumstances, be considered as a mitigating factor in determining gravity of violation, from the standpoint of misconduct of the violator, and good faith and history of compliance. In this respect, the gravity of misconduct is serious for the reason that the Respondents intended, by retaining a certified applicator, to circumvent the Act and regulations, by creating the appearance of compliance, when they had no real intentions of utilizing the services thus contracted for. The gravity of potential harm to the public is lessened by the showing in the record that Respondent Singleton, and Homestead, were competent to make the applications as well as to provide guidance and instruction (including the use of a movie and written materials - see Finding 46). Further, both Singleton and Homestead were certified, after 1981, as certified applicators (Finding 6; II T. 157), which reflects

---

4/ It will be noted that Section 14(a)(1) does not include the phrase "knowingly violate" as does Section 14(b)(1) which pertains to criminal penalties.

favorably on their competence prior to the time of their certification.

At the second session of the Hearing (II T. 72), Respondents' Counsel was authorized to furnish copies of Respondents' tax returns along with its Brief. Said returns show that whereas Respondents were in Category III in 1981 (Gross Sales over $600,000), their gross sales in 1982 dropped to $176,301 (Category II). Respondents attributed the drop in receipts to bad publicity, the "Payment in Kind" program of the U.S. Department of Agriculture, and because of fewer insects (Finding 39, supra). While neither amount is indicative of the amount of gross sales experienced in 1983 and anticipated in 1984, there is cause for concluding that the amount for those years will be "off peak" for the reasons cited; further, Respondents have liabilities and debts that must be serviced.

At the time of the Hearing session in April, 1984, however, Respondents' receipts from spraying in South Dakota appeared to be at a favorable level.

Upon consideration of the factors set forth in the Act and Regulations, I find that the assessment of a civil penalty for 400 violations, in accordance with the Guidelines, is unrealistic and that a civil penalty should be rationally arrived at by consideration of Respondents' financial condition (said Category II), and the gravity of its misconduct and the violations found. I have further considered that Respondents' history of compliance, prior to subject violations, were favorable. I also find that said violations resulted from misapprehension as well as lack of good faith.

In the premises, I conclude that an appropriate penalty to be assessed for the violations, found under Count I of the Complaint, is the amount of $10,000, and that the Final Order appearing hereinbelow should be and it is hereby proposed.

FINAL ORDER 5/

1. Pursuant to Section 14(a)(1) of the FIFRA Act, as amended, a civil penalty of $10,000 is assessed, jointly and severally, against Respondents Singleton Spray Service Co., Inc., a South Dakota Corporation; Thomas T. Singleton; and Esther Singleton, for the violations established by the evidence on the basis of Count I of the Complaint.

2. Payment of $10,000, the civil penalty assessed, shall be made within (60) days after receipt of the Final Order by forwarding to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region IX, a Cashier's Check or Certified Check, made payable to the Treasurer, United States of America.

3. Count II of the subject Complaint is hereby dismissed.

DATED: August 17, 1984

Marvin E. Jones
Administrative Law Judge

5/ 40 CFR 22.27(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. Section 22.30(a) provides for appeal herefrom within 20 days.

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 C.F.R. 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region IX, U.S. Environmental Protection Agency, 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.

DATED: August 17, 1984

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ

CERTIFICATE OF SERVICE

I hereby certify that the original of the foregoing Initial Decision of Administrative Law Judge Marvin E. Jones, together with the record, was mailed to the Hearing Clerk, U.S. Environmental Protection Agency, and that a copy of the Initial Decision was served on each of the parties, as follows, on the date set out below:

Mrs. Bessie Hammiel
Hearing Clerk (A-110)
U.S. Environmental Protection Agency
401 M Street, S.W.
Room 3708A, Waterside Mall
Washington, DC 20460

Certified Mail No.
P 429 564 758

Robert J. Welliever, Esq.
Suite C
1833 N. Third Street
Phoenix, AZ 85004

Certified Mail No.
P 429 564 759

David M. Jones, Esq.
Office of Regional Counsel
U.S. Environmental Protection Agency
Region 9
215 Fremont Street
San Francisco, CA 94105

Hand Delivered

Dated at San Francisco, California, this 22nd day of August 1984.

Lorraine Pearson
Regional Hearing Clerk