UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the matter of	)	
	)	
GARY BUSBOOM, et al.,	)	Docket No.
	)	FIFRA-09-0641-C-89-06, et al.
	)	
Respondent.	)	

INITIAL DECISION

This is a consolidated proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, as amended ("FIFRA"), Section 14(a), 7 U.S.C. 136l(a), on complaints issued by the U.S. Environmental Protection Agency ("EPA") for the assessment of a civil penalty for alleged violations of the Act.[1] The unlawful act

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[1] FIFRA, Section 14(a) reads in pertinent part as follows:

> (a) Civil penalties
> (1) In general - Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5000 for each offense.
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> (2) Private applicator - Any private applicator or other person not included in paragraph (1) . . . who holds or applies registered pesticides, or uses dilutions of registered pesticides only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served and who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $500 for the first offense nor more than $1000 for each subsequent offense.
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> (3) Hearing - No civil penalty shall be assessed unless the person charged shall have been given notice and opportunity for a hearing on such charge in the county, parish or incorporated city of the residence of the person charged.

charged in the complaint for which all respondents are held liable is that a restricted use pesticide was made available to and applied by a person who was not a certified applicator, in violation of FIFRA, Section 12(a)(2)(F), 7 U.S.C. 136j(a)(2)(F).[2] Respondents Taliaferro's Feed & Seed, Inc. and its owners ("Taliaferro") are charged with distributing a pesticide classified as a restricted use pesticide for application by a person who was not certified applicator.[3] Respondent Gary Busboom is charged with using the pesticide without being certified to use restricted use pesticides. A penalty of $25,000 has been requested against Taliaferro, and a penalty of $1,000 against Busboom.[4]

Respondents answered putting in issue their liability for a penalty. A hearing was held on May 9, 1991, at which the EPA and Taliaferro appeared by counsel and Busboom appeared pro se. Posthearing briefs have been filed by both the EPA and Taliaferro. This decision is rendered on consideration of the entire record and the briefs of the parties.

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[2] Pesticides are classified as restricted use pesticides pursuant to FIFRA, Section 3(d)(1)(c), 7 U.S.C. 136a(d)(1)(c).

[3] The complaint against Taliaferro Feed & Seed, Inc. includes not only the corporation but also persons alleged to be its owners, namely, Danny R. Taliaferro, Red Taliaferro, Jill Taliaferro and Joyce Taliaferro. See Judge Vanderheyden's order dated March 5, 1991.

[4] Consolidated with this proceeding were also the complaints against Ted de Bragga (Docket No. FIFRA-09-0642-C-89-07) and Rodney A. Weishaupt (Docket No. FIFRA--09-0642-C-89-08), who purchased the restricted pesticide for use on their respective farms. Proceedings against them were settled by entry of consent orders. EPA's Posthearing Brief at 5.

DECISION[5]

Taliaferro's Feed & Seed, Inc. operates a feed and seed store in Youngton, Nevada. It was incorporated in November 1988.[6] Prior thereto, the business was operated as a sole proprietorship by Dalton R. (Red) Taliaferro, who started the business in August 1986.[7]

The complaint in this proceeding arises out of information obtained from a Restricted Pesticide Dealer Audit of Taliaferro's records with respect to its sale and distribution of restricted use pesticides.[8] The investigation was made by State employees who were authorized to investigate violations of both state law and of FIFRA.[9]

The following records were obtained with respect to Taliaferro's sales of the restricted use pesticide Di-Syston:

a. Taliaferro's registry showing that on April 5, 1988, Rod Weishaupt and Ted de Bragga each purchased 5 gallons of "Dyston

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[5] The following abbreviations are used: "Tr." refers to the transcript of proceedings; "CX" refers to the complainant EPA's exhibits; "RX" refers to respondent Taliaferro's exhibits.

[6] Tr. 121-123; RX 13.

[7] Tr. 122,171-172, 180; RX 14-16 (Schedule C). The EPA asserts that the corporation is operated by Dalton Taliaferro, Dan Taliaferro, Joyce Taliaferro and Jill Taliaferro. The corporation is actually owned by Dalton and Daniel Taliaferro, Tr. 160-161. Jill and Joyce Taliaferro appear to have been at all times only employees. Tr. 179-180.

[8] Dealers were required under state law to keep a registry providing information about purchases of restricted use pesticides . Tr. 52, 53, 132-133; CX 7.

[9] Tr. 54, 63.

4L", EPA Registration No. 3125-307. The entry for de Bragga also showed the name of Gary Busboom as applicator.[10] This registry record was obtained by the investigator during the inspection on May 18, 1988.[11]

b. What appears to be a sales slip dated April 29, 1988 showing the sale of 50 units of "Dyston L" to Rod Weishaupt.[12]

c. A copy of Taliaferro's registry showing that on May 17, 1988, Rod Weishaupt purchased 5 gallons of Dy-Syston, EPA Registration No. 3125-172, to be applied by Busboom, and Ted de Bragga purchased 5 "lbs" of Di-Syston with the same EPA registration No. also to be applied by Busboom.[13]

The fact that neither de Bragga nor Weishaupt were certified applicators at the time of purchase is not disputed. Also not disputed is the fact that Gary Busboom was not a certified applicator at the time he did the applications.

The EPA contends that the records of Taliaferro's sales show five separate instances where Taliaferro violated the law in its sales of Di-Syston to de Bragga and Weishaupt. Taliaferro, on the other hand, argues that only two 5-gallon sales of Dy-Syston were made each one being of Di-Syston 8, EPA Registration No. 3125-307,

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[10] CX 7; Tr. 38-39; 137.

[11] CX 7.

[12] CX 5; Tr. 43, 128-130, 158-160.

[13] CX 4; Tr. 42-43.

one sale being made to Weishaupt and one sale being made to de Bragga.[14]

The record is subject to differing interpretations as to what sales of Di-Syston actually took place. Nevertheless, Taliaferro's explanation that the May 17 entries of sales duplicated the sales shown for April 5th, and that they were the only sales made is more consistent with the facts than that there were five separate sales.[15] I find, accordingly, that there were only two sales of a restricted use pesticide in violation of FIFRA and not the five charged in the complaint.

Taliaferro argues that no more than a token penalty should be assessed against it, because its sales to uncertified applicators

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[14] See RX 11. The labels for Di-Syston 8 are attached to the EPA's posthearing brief and to its response to Taliaferro's responsive posthearing brief. The EPA's motion for leave to respond to Taliaferro's responsive brief is granted. The sole purpose of the EPA's response was to meet Taliaferro's argument made in its responsive brief for the first time that Di-Syston 8 did not become a restricted use pesticide until after the sales to de Bragga and Weishaupt.

[15] Tr. 140-142; Rx 1, Rx 2, RX 4, RX 8, RX 11. Busboom is charged with only two applications, one for de Bragga and one for Weishaupt. Busboom's uncontradicted testimony is that 5 gallons were applied at each application. Tr. 22, 33-34. The method of application described, pouring the pesticide into the tank with the fertilizer (Tr. 26), also indicates that the pesticide used was Di-Siston 8 (shown as "4L" on the registry for April 5) and not the granular Di-Syston, the sale of which was shown on the registry for May 17. See CX 4, CX 7, and labels attached to the EPA's posthearing brief. The application rate given by Busboom, 1 1/3 pints per acre, does suggest that more than 5 gallons could have been used on each application given the size of the parcels (76 acres for de Bragga and 65 for Weishaupt). Tr. 34. A gallon, assuming it is equal to 8 pints, would cover only 6 acres. Regardless of the inference that might be drawn from this, the weight of the evidence is that only five gallons were applied to each parcel.

who represented that the product would be applied by a certified applicator did not violate state law and it should not be held responsible if the purchasers misuse the product. The State law apparently permits the sale of a restricted use pesticide to a farmer if the purchaser represents that the pesticide will be applied by a certified applicator.[16] It is federal law that is controlling in this situation, however, and not state law. The only exception allowed under federal law for sales of restricted use pesticides to uncertified applicators is where the Administrator has issued regulations governing such sales.[17] The only regulations issued by the Administrator have been with respect to sales made in states where the EPA conducts the pesticide applicator and certification program, which is not the case with Nevada.[18]

Taliaferro, nevertheless, does raise the question of whether there are grounds for assessing only a nominal penalty because of what it claims to be confusion between the state requirements,

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[16] Tr. 51, 61.

[17] FIFRA, Section 12(a)(2)(F), 7 U.S.C. 136j(a)(2)(F).

[18] See Custom Chemical & Agricultural Consulting, Inc., FIFRA Appeal No. 86-3 (1989) at 5-6. Relying on testimony by the state inspector (Tr. 64-65), Taliaferro argues that it was the application by Busboom that violated federal law and not the sale by Taliaferro to uncertified applicators. This is not a correct interpretation of either the statute or the federal regulations. Custom Chemical & Agricultural Consulting, supra; Helena Chemical Co., FIFRA Appeal No. 87-3 (1989) at 5-6.

which Taliaferro argues it did not violate, and the federal requirements.[19]

The record shows that Taliaferro paid scant attention to keeping accurate and complete records with respect to its Di-Syston sales. The Di-Syston was incorrectly described as "4L" on the registry and Gary Busboom was incorrectly shown as a certified applicator, apparently upon the representations by de Bragga and Weishaupt.[20] Taliaferro found out that Busboom was not certified when the pesticide was delivered. The pesticide was still made available for application by Busboom, because Mr. Daniel Taliaferro erroneously assumed that Busboom did not have to be a certified applicator.[21] This assumption was based on a very superficial research of what the law required.[22]

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[19] Although FIFRA may well be a strict liability statute, it does expressly recognize that in assessing the penalty there may be taken into account the gravity of the violation. FIFRA, Section 14(a)(4), 7 U.S.C. 136l(a)(4). See also the 1974 penalty policy, the relevant penalty policy for this case (EPA's posthearing br. at 10), 39 Fed. Reg. 27712 (July 31, 1974).

[20] CX 6; Tr. 137.

[21] Tr. 161-162; CX 2. Daniel Taliaferro's testimony differs somewhat from his sworn statement that he "assumed" that Busboom was certified. See CX 2. In his testimony he stated that he understood the law to be that the applicator did not have to be certified, if the pesticide was being used on the applicator's own property. Tr. 133, 139.

[22] Mr. Taliaferro had not sought any guidance from the State Department of Agriculture, which furnished the registry forms, with respect to the use of restricted pesticides but relied upon what people told him and on his salesman's knowledge of the requirements. Tr. 133-134.

Taliaferro argues that the record contains no evidence that Di-Syston 8 was a restricted use pesticide at the time. To the contrary, Taliaferro never questioned the fact that it was a restricted use pesticide.[23]

The record simply does not support Taliaferro's argument that it was justified in relying on its understanding of the state law because of the asserted confusion between state and federal requirements. What the record does show is the lack of any diligent and responsible effort by Taliaferro to find out what its duties were under even the state law. If Taliaferro had made such an effort it might well have learned that there were both state and federal requirements with respect to selling restricted use pesticides and that reliance could not be placed on state regulations alone.[24]

It is not necessary here to determine whether there was any violation by Taliaferro of the federal law prior to the delivery of the pesticide to the purchasers. It is plain that there was a violation when the pesticide was delivered by Taliaferro to purchasers who were not certified applicators for application by an

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[23] RX 11. The EPA in its response to Taliaferro's reply brief has submitted a label showing that Dy-Syston 8 has been a restricted use pesticide since as early as November 1981. Testimony that Di-Syston 8 had not been a restricted use pesticide in 1987 (Tr. 25) or first became restricted in 1987 (Tr. 45), would appear, then, to be incorrect.

[24] Although the state investigator apparently did not know precisely what federal violation had been committed by Taliaferro (see Tr. 56-57, 64-65), there is no question but that he understood that there was a possible violation of federal law by Taliaferro. See Tr. 56-57.

uncertified applicator. There were two instances where this occurred. Based on financial data submitted by Taliaferro, which the EPA does not question, the appropriate penalty for each violation is $1,250.[25]. The total penalty to be assessed against Taliaferro, accordingly, is $2,500.

The EPA apparently seeks an order not only against the corporate respondent but also against four individuals alleged to be the owners of the corporate respondent. At the time the violations were committed, Taliaferro was a sole proprietorship operated by Dalton R. Taliaferro. Daniel R. Taliaferro appears to have been the manager of the operation.[26] After the business was incorporated, Dalton and Daniel Taliaferro were the only shareholders.[27]

The amended complaint charged the corporate respondent and four individuals, Daniel (Danny) R. Taliaferro, Dalton (Red) Taliaferro, Jill Taliaferro and Joyce Taliaferro. Judge Vanderheyden in his order of March 5, 1991, while finding that these individuals should be made parties along with the corporation, did not decide against whom an order should be issued.

The actual violations were committed by Daniel Taliaferro, so the order is properly entered against him. The order is also properly entered against Dalton Taliaferro as the owner of the

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[25] Tr. 116; RX 17. See EPA's posthearing brief at 16.

[26] Tr. 121-122.

[27] Tr. 160.

business at the time the violations were committed.[28] It is also appropriate to enter the order against the corporation, as it was simply a continuation of the business with the ownership now consisting of both Dalton and Daniel Taliaferro, and the management still remaining in the hands of Daniel.[29] There is, however, no evidence that Jill Taliaferro and Joyce Taliaferro had any involvement in the violations and the complaint will be dismissed as to them.

Accordingly, for the reasons stated, a penalty of $2,500 is assessed against Taliaferro's Feed and Seed, Inc., Daniel R. Taliaferro and Dalton R. Taliaferro, for which they are jointly and severally liable.

Gary Busboom, the applicator, does not dispute that he was not certified at the time he applied the Di-Syston 8. He claims to have acted in good faith but the record shows that he simply did not know that his applications were illegal. That he became certified soon after the incidents is no grounds for mitigation, since he was

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[28] See FIFRA, Section 14(b)(4), 7 U.S.C. 136l(b)(4). Although this specific provision is placed under the "criminal penalties" section, the wording is broad enough to encompass civil as well as criminal penalties.

[29] Cf. Cyr B. Offen & Co., Inc., 501 F. 2d 1145, 1150-1154 (1st Cir. 1974) (corporate successor to sole proprietorship held liable for torts of its predecessor where business was purchased by group of employees of proprietorship and there was no change in the operations). I recognize that in that case the liability of the successor was treated as a question of state law. The principle applied there, however, that where the successor corporation is merely a continuation unchanged in any material respect of the predecessor's business, the successor cannot escape liability for the acts of the predecessor, seems equally applicable to liability for violations of FIFRA.

merely doing what the law required if he wished to continue applying restricted use pesticides. The penalty of $500 for each violation, or a total penalty of $1,000, is in accord with FIFRA, Section 14(a)(2), 7 U.S.C. 136l(a)(2). Mr. Busboom has offered no evidence to indicate that he is incapable of paying the penalty.[30]

ORDER[31]

Pursuant to FIFRA, Section 14(a), 7 U.S.C. 136l(a), the following order is entered:

1. A civil penalty of $2,500 is assessed jointly and severally against Taliaferro's Feed and Seed, Inc., Daniel R. Taliaferro and Dalton R. Taliaferro.

2. A civil penalty of $1,000 is assessed against Gary Busboom.

Each party shall pay the full amount of its respective penalty within thirty (30) days of the effective date of the final order. Payment shall be made by forwarding a cashier's check or certified

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[30] Since Mr. Busboom is appearing pro se, he is advised that upon a proper showing the record can be reopened to reconsider the question of whether he is financially able to pay a penalty of $1,000. A motion to reopen must be made within twenty (20) days after service of this decision upon him See 40 C.F.R. 22.28.

[31] 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).

check in the full amount payable to the Treasurer, United States of America, at the following address:

EPA-Region 9
(Regional Hearing Clerk)
P. O. Box 360863M
Pittsburgh, PA 15251

Gerald Harwood
Senior Administrative Law Judge

Dated: OCT 17 1991