UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	IF&R No. VIII-91C
AGLAND INCORPORATED, CO-OP	)	
	)	
Respondent	)	

1. Federal Insecticide, Fungicide and Rodenticide Act - Penalty Assessment - Selling a restricted-use pesticide to an experienced applicator whose certification had expired is not a serious violation, absent a showing of actual harm or the potential therefore.

2. Federal Insecticide, Fungicide and Rodenticide Act - Legality of Inspection - Where the inspection was consented to and documents were voluntarily given to the duly authorized inspector, no valid defense to the admissibility of the documents may be made after the fact.

Appearances:

For Complainant:

David J. Janik, Esquire
Denver, Colorado

For Respondent:

Michael P. Dugan, Esquire
Eaton, Colorado

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INITIAL DECISION

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, 7 U.S.C. 136 l(a), for assessment of civil penalties for violations of 7 U.S.C. 136-136y (1972), of the Federal Insecticide, Fungicide and Rodenticide Act, as amended. This proceeding was initiated by a Complaint issued on some indeterminable date in the latter part of 1982 alleging the violation of the above-mentioned Act on the part of the Respondent by selling to a person not a certified applicator, a restricted-use pesticide generically known as Paraquat. The Respondent filed his Answer on January 31, 1983, and this matter was referred to the undersigned Administrative Law Judge on February 16, 1983.

In his Answer, the Respondent essentially admitted the factual allegations set forth in the Complaint, but challenged the basis of the Complaint, alleging that the inspection was based on an insufficient warrant and that, therefore, any evidence or documents obtained by the inspector on his visit were inadmissable under the Fourth Amendment of the United States Constitution. Although the Court advised the Respondent that it has no jurisdiction to determine constitutional issues, inasmuch as this was a threshold issue

going to the legality of the inspection, a decision on that legal issue would be forthcoming. Following the receipt of briefs on this question from the parties, the Court issued a decision on June 8, 1983 which held that the search and seizure was consented to by the Respondent and that, therefore, the samples and documents obtained by the inspector were admissable. Inasmuch as the Respondent admitted the factual allegations of the Complaint, the Court attempted to persuade the Respondent to submit this matter on briefs without a hearing, solely on the question of the appropriate penalty to be assessed. Respondent advised that he felt his position could not be adequately presented through affidavits and supporting briefs, but that a hearing would be required for that purpose. Accordingly, a hearing was held on June 20, 1983 in Greely, Colorado. Following the distribution of the transcript, initial and reply briefs were received and the matter is now before me for decision.

Discussion

The Respondent, a Colorado corporation, has one of its places of business in Gilcrest, Colorado. The Respondent is in the business of providing supplies to the agricultural industry of Colorado including feed, seed, fertilizers and pesticides. On or about August 9, 1982, William G. Dorance, an authorized EPA Consumer Safety Officer, conducted an inspection of Respondent's facility in Gilcrest to determine compliance with the requirements of FIFRA and its implementing regulations. During that inspection, Mr. Dorance reviewed Respondent's files and determined that on July 24, 1982, the Respondent's agents sold one gallon of Paraquat to Harold Leroy Johnson of Greely, Colorado. At the time of the sale, Mr. Johnson was not

a certified applicator since his certification had expired in March 1981 and had not been renewed. The invoice noted Mr. Johnson's certification number and its expiration date. Paraquat is and was at the time of the sale mentioned a pesticide classified for restricted use by the EPA. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. 136j(a)(2)(F), makes it unlawful for any person to make available for use any registered pesticide classified for restricted use unless that person is certified as a qualified applicator of said restricted-use pesticide. The sale of Paraquat to Mr. Johnson constituted a violation of §12(a)(2)(F) of FIFRA. The Complaint proposed a civil penalty in the amount of $1,200.00 to be assessed against Respondent for this violation.

As indicated above, Respondent did not deny the factual allegations regarding the essential facts set forth in the Complaint. Essentially then it is my duty to determine an appropriate penalty to be assessed in this matter.

In determining the amount of the penalty which should be appropriately assessed, §14(a)(3) of the Act requires that there shall be considered the appropriateness of the penalty to the size of the Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violation. The regulations further provide that in evaluating the gravity of the violation there should also be considered the Respondent's history of compliance with the Act and any evidence of good faith efforts of the Respondent.

In previously decided civil penalty cases under FIFRA, it has been held that the gravity of the violation should be considered from two aspects: that is, gravity of harm and gravity of misconduct.

At the hearing, the Respondent produced evidence which indicated that Mr. Johnson had in previous years been a certified applicator and was familiar with the requirements regarding the application of Paraquat and that, in any event, the person who sold the Paraquat to Mr. Johnson was himself a certified applicator and cautioned Mr. Johnson about the use of the pesticide prior to the sale and gave Mr. Johnson his telephone number and advised him that if he had any questions concerning the limitations surrounding the application of this pesticide, he should call the salesman and he would give him advice in that regard. The Respondent also produced evidence to the effect that to become a certified applicator, one need only fill in a rather simple questionnaire, the answers to which are found in the back of the questionnaire booklet and that to the knowledge of the EPA no one who has ever taken the applicator's test has ever failed it. Therefore, I am of the opinion that, although the record is clear that the pesticide was sold to Mr. Johnson, a person whose certification had expired, the gravity of the misconduct was of a low order and that the gravity of harm resulting from the sale was also of a low order.

The Complainant argues that the proposed penalty of $1,200.00 was calculated in accordance with the policy and guidance set forth in the "Civil Penalty Assessment Schedule" 39 F.R. 27711-113. This schedule takes into account the gravity of the violation and the size of the business of the person charged. The instant case involves the making available for use, a restricted-use pesticide to a non-certified applicator. EPA policy suggests using the existing matrix for a different violation: i.e., use inconsistent with labeling--this is known as a charge code "E28" in the civil penalty schedule, 39 F.R. 27711, 116.

Within this matrix, Complainant deduced that the Respondent falls into Category V as to the size of the business; this means that it has more than one million dollars in annual gross sales.

The final determination necessary to calculate the proposed penalty by the schedule relates to the probability of adverse effects, requiring Complainant to choose among "highly probable", "unknown", and "not probable".

Using the above-mentioned penalty schedule, the Complainant, taking into account the sale was made to a person who had once been certified, concluded that the adverse effects category would probably fall into the "not probable" portion in the matrix and, therefore, a penalty for a Category V business would be $1,200.00. As to the gravity of the violation, the Complainant takes the position that considering the extremely toxic nature of the chemical involved*, the potential harm to man by mis-use of this product is very great, a conclusion buttressed by the label information.

In his post-hearing briefs, counsel for the Respondent argues primarily the illegality of the inspection and continued to urge the Court to dismiss the Complaint inasmuch as all the evidence obtained was done so without a propoer warrant in violation of the United States Constitution. These matters were addressed in some detail in the pre-trial decision heretofore issued, a copy of which is attached hereto and made a part of this decision. Although the Respondent's argument is interesting, it is invalid since the inspection was consented to and the documents requested were voluntarily given to the inspector by the Respondent's employee. Since no objection was made to the inspection, no warrant was necessary and therefore EPA did

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*It should be noted that no evidence was produced as to the toxicity of the pesticide involved and thus Complainant's reliance on that factor is not warranted. In response to a question by the Court, Mr. Dorance made vague reference to the fact that he assumed that restricted-use pesticides are toxic in some degree, but no specific testimony on Paraquat's toxicity was given, nor was the product label introduced.

not obtain one. Had the inspector been denied access to the premises, then EPA would have obtained a warrant and continued with the inspection at a later date. Inasmuch as no objection was made to the inspection and no evidence was produced at the trial which indicated that the inspection and the taking of the documents were done over the objections of the Respondent, I do not feel that any further discussion of this defense is warranted.

Although it is true that Paraquat is a toxic pesticide and its use and application must be done in strict accordance with the product label, the evidence in this case indicates that the applicator, although not currently certified, was knowledgeable about the restrictions on the use of this product and the conditions that must be observed when applying it. Although the Agency does not allege that any actual harm to the environment resulted, it argues that the potential for such harm is high, given the toxic nature of the pesticide. Testimony was presented by the Respondent which indicated that Mr. Johnson has used this pesticide on prior occasions and is an experienced farmer, and is fully cognizant of the conditions under which the pesticide must be used. Although lack of actual harm to the environment is not an absolute defense in this matter, since the statutes and the regulations essentially concern themselves with the potential for harm, I am of the opinion that, given the circumstances of this case, the potential for harm was very low considering the applicator's long experience in the use thereof.

Accordingly, I am of the opinion that the appropriate penalty to be assessed in this matter is $500.00.

I have considered the entire record of this case consisting of the evidence introduced by the parties and the arguments presented by them in their briefs and any suggestions, comments, requests or arguments inconsistent with this decision are denied. It is proposed that the following Order be issued.

FINAL ORDER[1]

Pursuant to §14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $500.00 is assessed the Respondent, for the violation which has been established on the basis of the Complaint issued in the latter part of 1982.

Thomas B. Yost
Administrative Law Judge

DATED: August 10, 1983

1/ Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this Decision shall become the Final Order of the Administrator in accordance with 40 CFR 22.27(c).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
THE ADMINISTRATOR

IN RE	)	
	)	IF&R No. VIII-91C
AGLAND, INCORPORATED CO-OP	)	
	)	ORDER ON MOTION
Respondent	)	

In its March 31, 1983 prehearing response, counsel for the Respondent argued that the inspection of Respondent's facility, conducted by an authorized EPA employee, which gave rise to the Complaint in this case, was illegal, improperly done and violative of the Fourth Amendment to the U.S. Constitution as an illegal search and seizure. Briefs on this were provided.

The facts in this case, as revealed by the pleadings, indicate that on or about August 9, 1982, an authorized EPA consumer safety officer conducted an inspection of the Respondent's facility in Gilcrest, Colorado to determine compliance with the requirements of FIFRA and its implementing regulations.

The officer presented his credentials as well as a notice of inspection, as required. On the notice of inspection, the officer checked the block indicating that the reason for the inspection was to inspect and obtain samples of pesticides, etc. The second box on the form would indicate that the purpose of the inspection was to inspect and obtain copies of certain specified records. As to "violation suspected", the officer indicated "none".

During the course of the inspection, the officer determined that some "restricted use" pesticide had been sold to an individual whose certification had expired. The officer requested copies of the documentation relative to this situation, which were provided by the facility manager. A receipt for the documents was given to the manager who signed the receipt. The officer then left with the documents.

Respondent's counsel now raises the defense that since the officer indicated that the purpose of the inspection was to take samples of pesticides, the taking of the documents was an unlawful search and seizure in violation of the Fourth Amendement and, therefore, the use by the Agency of the documents in Court is proscribed.

Counsel for the Agency argues that since the inspection was consented to by the Respondent's agent, it is too late to raise the question of the validity of the inspection and the taking of copies of the relevant documents. I agree.

DISCUSSION

It is well settled that a warrantless search is permitted if it is consented to by the owner or his agent or representative. It is also well settled that, if in the course of a legal warrantless search for one purpose, the officer sees evidence constituting a different crime, he may legally seize such evidence without violating the Fourth Amendment. A common example of this would be a random stopping of motor vehicles to check for safety inspection stickers or drivers licenses, wherein the officer observes in plain view, drugs or other indicia of a separate crime. He may legally sieze the drugs or other evidence.

In this case, the officer was legally and properly on the premises of the Respondent conducting a valid inspection. The fact that he originally described the purpose of the inspection to be the taking of pesticide samples does not preclude him from inspecting records and other documents should his inspection reasonably lead him to them. He is not precluded from requesting and obtaining copies of such documents for later use in a trial.

Although as previously indicated, this Court lacks the jurisdiction to rule on constitutional issues, I felt that this threshold issue should be addressed.

I am, therefore, of the opinion that the inspection and the obtaining of copies of certain documents was legal, proper and did not violate any rights granted to the Respondent by the Fourth Amendment to the U.S. Constitution for two reasons:

1. The search and seizure were consented to by the Respondent.

2. The search was legal and proper despite the fact that the purpose of the inspection was for samples, and documents were ultimately obtained, for the reasons given above.

The Respondent's motion to exclude the documents obtained by the inspecting officer is denied.

T B. Yost

Thomas B. Yost
Administrative Law Judge

DATED: June 8, 1983