

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF

CONVERSE COUNTY WEED AND
PEST CONTROL DISTRICT

DOCKET NO. I.F.&R. VIII-95-382C

RESPONDENT

INITIAL, DECISION -1/

The initial complaint in this matter was issued on September 29, 1995. Respondent requested a hearing on October 24, 1995. An oral hearing was held, on May 20, 1997, in Cheyenne, Wyoming. Following the hearing, on July 8, 1997, complainant moved to amend the complaint. The motion was granted on August 5, 1997. The parties filed proposed findings and conclusions on July 8, 1997 and responses on July 22, 1997. The undersigned was assigned to this case on December 2, 1996. It was consolidated with Leo Stangle d/b/a Gopher Choker, Docket No. IF&R VIII-96-04. The complaint in Leo Stangle was withdrawn on January 27, 1997.

FINDINGS OF FACT: On April 20, 1994, Michael Rudy, a credentialed U. S. EPA enforcement inspector conducted a Routine Use/Misuse Inspection at respondent, Converse County Weed and Pest Control District. Respondent is a pesticide dealer operating at No. 59, State Highway 59 in Douglas Wyoming. EPA administers part of the FIFRA program in the Wyoming. Rudy's inspection found two pallets of ZP Rodent Bait AG which lacked the Wyoming State Registration Section 24 © label and the federal label required by FIFRA § 25 c. ZP Rodent Bait AG is a federally registered pesticide, EPA Registration Number 12455-17.

On September 28, 1992, respondent ordered 425 thirty-three pound bags of ZP Rodent Bait AG WY24 © from Bell Laboratories, Inc. Respondent received the shipment on October 2, 1992. When the shipment was received the bags of pesticide did not have physically affixed or stamped on them a federal label. The only label affixed or stamped on the bags was an incorrect, out-of-date

state registration label. When the respondent sold or distributed the misbranded ZP Rodent Bait AG, the sale or distribution was accompanied by a copy of the federal label. The respondent did not remove or obliterate the out-of-date Wyoming State Registration Section 24 © label on the bags and it did not accompany sales or distribution of them with the current Wyoming State Registration Section 24 © label. In 1992 and 1993, respondent distributed 414 bags of ZP Rodent Bait AG to contractors or customers in this manner.

CONCLUSIONS: Respondent does not challenge that EPA has jurisdiction over this case pursuant to FIFRA § 14 (a) (1), 7 U. S. C. § 1361 (a) (1), that EPA administers a portion of the FIFRA program in the state of Wyoming, that it is a pesticide dealer in Wyoming, and that it is a person within the meaning of the FIFRA § 2 (s), 7 U. S. C. § 136 (s) and subject to regulation, Respondent also does not dispute that ZP Rodent Bait AG is a federally registered pesticide, EPA Registration Number 12445-17.

FIFRA § 12 (a) (1) (E), 7 U. S. C. § 136 j (a) (1) (E), provides that it is unlawful for any person in any State to distribute or sell to any person pesticide which is misbranded. A pesticide is misbranded if it is contained in a package or other container which does not conform to the standards established by the Administrator pursuant to § 136 w © (3). FIFRA § 2 (q) (1) (B), 7 U. S. C. § 136 (q) (1) (B).

The 425 thirty-three pound bags of ZP Rodent Bait AG WY 24 © which respondent received from Bell Laboratories on October 2, 1992 was misbranded because each bag of the product did not have physically affixed or stamped on it a federal label, which is required by FIFRA § 3, and each bag of the product did have physically affixed or stamped on it an incorrect, out-of-date, state registration label, obtained pursuant to § 24 © of FIFRA. "The label shall appear on or be securely attached to the immediate container of the pesticide product. ... '[S]ecurely attached' shall mean that the label can reasonably be expected to remain affixed during the foreseeable conditions and period of use." 40 C. F. R. § 156. 1 0 (a) (4) (1996).

Respondent sold or distributed 414 misbranded bags of ZP Rodent Bait AG WY24 © between October 2, 1992 and April 20, 1994. They were sold or distributed without the "federal" label registered under FIFRA § 3 physically affixed or stamped onto each bag of the pesticide. The 414 bags that were distributed or sold had affixed an incorrect, out-of-date state local need registration label, obtained pursuant to § 24 © of FIFRA. Respondent provided its contractors a correct federal label when the pesticide was distributed but it was not

attached to the bag of pesticide and did not conform with the regulations. Respondent did not provide the current state label to customers or its contractors when the pesticide was distributed or sold.

The sale or distribution of the 414 misbranded bags of ZP Rodent Bait AG WY24 © without their current federal and state labels did not conform to the labeling standards established by the administrator and were, therefore, in violation of FIFRA § 2 (q) (1) (B). Distribution of a pesticide without the current labels attached to the product, which does not conform to the regulations, is unlawful pursuant to FIFRA § 12 (a) (1) (E).

The complainant seeks a penalty assessment of \$3,000 for each of the two violations. The analysis in support of complainant's request was made by Timothy Osag, a Senior Enforcement Coordinator. Osag followed the Enforcement Response Policy for FIFRA (ERP), dated July 2, 1990. ERP implements FIFRA § 14 (a) (4) which directs the agency to consider the gravity of the respondent's violation, the size of its business and the penalty's effect on the respondent's ability to continue in business. The ERP policy assigns a gravity value at level two (out of four possible levels) for misbranding in violation FIFRA § 12 (a) (1) (E). When Osag examined the size of respondent's business, he concluded that it should be in the smallest business category under the ERP because it is a division of the county government which relies on taxes to a great degree for its support. The lowest category of business, or category 3, under the policy is gross sales between zero and \$300,000. Under the ERP matrix, the base penalty is \$3,000 per violation.

Osag applied a five step gravity adjustment factor to "get all the values right." The adjustment considers the pesticide involved, harm to human health, harm to the environment, compliance history and culpability. These factors are used to adjust the statutory maximum of \$5,000 up or down. ZP Rodent Bait AG @24 (c), the pesticide at issue in this case, was assigned a value of two because it is a restricted use pesticide. Osag concluded that the harm to human health was unknown but because of the nature of the restrictions on the labels there was a potential for harm. When harm is unknown but there is a potential for harm to human health, the policy directs that a value of 3 out of 5 be assigned. Osag also concluded that the harm to the environment was unknown. Under the policy, when the harm to the environment is unknown but there is a potential for harm, environmental harm is assigned a value of 3 out of 5 also. Osag found that respondent had no history of noncompliance for the last five years and, therefore, he assigned it a factor of 0. Osag believed that

culpability was unknown or possibly resulted from negligence. When culpability is unknown or there is negligence by the respondent, the value assigned is two.

The total of values assigned by Osag was ten. A value of ten under the ERP matrix warrants a \$3,000 penalty. Osag made no adjustment to his analysis based on the ability of the respondent to stay in business if a \$3,000 penalty were sought because complainant had no financial information about the respondent. Osag said that if the respondent had later presented financial information which indicated that the matrix penalty affected respondent's ability to stay in business, an adjustment would have been made to the analysis.

Osag stated that labels which are not physically affixed to the package present the possibility that, when the product is used, the user will not know how to use it safely both for himself and the environment. He claimed that where the contractor or purchaser is given two labels, the contractor is faced with a confusing choice of how to comply with the requirements. Osag pointed out that the new label contained environmental protections at the request of U. S. Fish and Wildlife Service and new general precautionary language which indicated that it should not be used around residences, in proximity to water, and in areas where non-targeted species could take the bait.

Respondent argues that there should be no penalty but only a warning. A warning would be appropriate, respondent claims, if the violation occurred despite the exercise of due care or if the violation did not cause significant harm to health or the environment. Respondent urges a finding that it exercised due care in its attempts to cure the defects in labeling and there was no significant harm to health or the environment. Respondent cites as evidence that it exercised due care, its notification to the manufacturer about the misbranded product. It urges that there is no evidence that there was significant harm to health or the environment and, therefore, no value should be assigned to those factors.

In addition, respondent asserts that the penalty policy is "grossly unfair" in this case. Respondent's argument appears to be that the presumptions of risk that attach to the policy factors that are unknown receive values that are so skewed that a penalty always attaches when various factors in the policy are unknown. Respondent urges that unless there is a showing of harm to the environment or human health, the assumption should be that there is no harm. Respondent also maintains that it is being treated differently from other violators. In this regard respondent points out that the manufacturer of ZP Rodent Bait AG WY24 (c), Bell Laboratories, paid a penalty of \$4,000, or \$2,000

for each misbranding violation while the complainant is seeking a penalty of \$6,000 for the misbranding violations from respondent. Even if the minimum penalty of \$1,800 per violation is sought, respondent urges, it is out of proportion to that paid by Bell Laboratories. Respondent urges that these disparities are unfair.

Respondent argues that its failure to remove the out-of-date Wyoming State Registration Section 24 © label and to provide the current state label is excusable because respondent believed that the pesticide would be applied during periods when the state label did not have to be followed. Respondent points out that there is no evidence that the misbranded ZP Rodent Bait AG WY24 © was "used for state label purposes." The incorrect state label attached to the bags, respondent argues, was surplusage in this context. Respondent claims that the state label was available to anyone who intended to use it when the state restrictions and requirements were applicable.

Respondent's argument that complainant presented no evidence of harm to human health or the environment and, therefore, there should be no gravity points assessed under the Enforcement Response Policy, focuses on only one-half of the Enforcement Response Policy gravity criteria. The policy states that the gravity assessment "is based on an average set of circumstances which considers the actual or potential harm to human health and/or the environment which could result from the violation, or the importance of the requirement of achieving the goals of the statute." ERP at 21. The complainant concedes that there is no actual evidence of harm. But there is evident potential for harm when a restricted use pesticide is sold or distributed without the proper label and with an improper label in the quantities found in this case. The respondent distributed 414 bags of the restricted pesticide to its contractors without the federal label affixed to the product and with an outdated state label. The method which respondent used to correct the problem entailed its own risks of potential harm. Respondent distributed by hand one copy of the federal label to its contractors and did nothing at all to advise them about the outdated state label. Respondent took this action despite the view of respondent supervisor Reichenbach that the state label had a "lot of vital information on it" that users needed to know no matter when they were going to use ZP Rodent Bait AG WY24 (c). Because there was no federal label on the bags and an incorrect state label, the likelihood exists that the restrictions that apply to the application of ZP Rodent Bait AG WY24 © were not followed. Respondent's solution was contrary to the rules and the statute governing pesticide labels. It has not shown that the harm that the rule seeks to prevent was foreclosed by its method of distribution.

While the ERP assesses points when the harm to human health and the environment have not been observed, this does not make the policy unfair or irrational. The risk to human health and the environment is known and has been determined or the pesticide would not be **restricted**. Failure to properly label a restricted pesticide increases the risk of harm because the **user** is unaware of the restrictions.

Respondent asserts that the penalty should be reduced because it called the manufacturer as soon as it discovered that the bags of ZP Rodent Bait AG WY24 © were misbranded. While respondent did act responsibly in that respect, the issue in this proceeding is whether it distributed ZP Rodent Bait AG WY24 © without the federal label attached to the bags of pesticide and with an outdated state label attached. There is no evidence that the manufacturer directed respondent to supply by hand a copy of the federal label instead of attaching it to the bags of the pesticide as the rule requires. Moreover, the manufacturer did not direct respondent to supply pesticide to its customers and contractors with an outdated state label. Respondent decided not to provide the current state label to its contractors and it failed to remove the outdated state label because it believed it irrelevant to its current use. Respondent made that claim despite its action in leaving the outdated state label on the bags because the information on the label was "vital." This is not a case where respondent inadvertently distributed restricted pesticide without the proper labels. The record indicates that respondent knew that the pesticide was misbranded.

Respondent's supervisor, Roy Reichenbach, is experienced in pesticide distribution; he was well prepared to make the right decision. Reichenbach has a degree in wildlife management and has studied weed management and business management. He has held his position as supervisor at respondent since 1992, he is a certified weed and pest control supervisor, and he is a state certified commercial applicator. Reichenbach attends two or three meetings a year of the Wyoming Weed and Pest Council. These meetings last from one to three days and consider "a wide area of information regarding pesticides, pesticide use, labels and that type of thing," Reichenbach testified. Despite his qualifications, Reichenbach chose a course that exacerbated the manufacturer's misbranding. Respondent's actions were inconsistent with the rules and, based on the record of this proceeding, do not reflect due care.

Respondent argues that the penalty for its violations should be no greater than that which was assessed against Bell Laboratories, the manufacturer who shipped to respondent the misbranded ZP Rodent Bait AG WY24 (c). There are no record

facts to test respondent's assertion that the penalty proposed by the complainant in this proceeding is unfair next to the settlement which complainant reached with Bell Laboratories. The penalty assessed Bell Laboratories was not determined in the hearing process and it was not associated with this case and, therefore, it is not possible to know what factors influenced the final settlement.

The complainant has justified assessing a penalty of \$3,000 for the violation found in count I and \$3,000 for the violation found in count 11. In arriving at this penalty both the statutory criteria and the record evidence have been considered. A \$6,000 penalty is fair and reasonable in this case.

ACCORDINGLY IT IS FOUND that respondent, by its conduct in selling or distributing a pesticide misbranded under FIFRA § 2 (q) (1) (B) as alleged in Counts I and II of the Complaint, violated FIFRA § 12 (a) (1) (E).

IT IS ORDERED that a civil penalty of \$3,000.00 IS ASSESSED for Count I and a civil penalty of \$3,000.00 IS ASSESSED for Count 11.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

U. S. EPA, Region VIII
(Regional Hearing Clerk)
Mellon Bank
P.O. Box 360859M
Pittsburgh, PA 15251

A transmittal letter identifying the subject case and the EPA docket number, plus respondent's name and address must accompany the check.

Failure by respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

Pursuant to 40 C.F.R. § 22.27 (c), this initial decision shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceeding unless (1) an appeal to the Environmental Appeals Board is taken from it by a party to this proceeding

or (2) the Environmental Appeals Board elects, sua sponte, to review this initial decision. If an appeal is taken, it must comply with § 22.30. A notice of appeal and an accompanying brief must be filed with the Environmental Appeals Board and all other parties and amicus curiae within twenty (20) days after the initial decision or accelerated decision is served upon the parties.

Edward J. Kuhlmann

Administrative Law Judge

August 22, 1997

Washington, D. C.

1/ The complainant was represented by Dana J. Stotsky, Esq. and Donna M. Arthur, Esq. Respondent was represented by Daniel B. Frank, Esq. and Thomas R. French, Esq.

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF

CONVERSE COUNTY WEED AND) DOCKET NO. I.F.&R. VIII-95-382C

PEST CONTROL DISTRICT

Respondent

ORDER

Under consideration is the state of Wyoming's motion to intervene, received March 31, 1997. Wyoming moves to intervene pursuant to § 22.11 of the rules of practice. The respondent and the complainant have not answered the motion. A proposed intervenor must set forth the grounds for the proposed intervention, the position and interest of the movant and the likely impact that intervention will have on the expeditious progress of the proceeding. The request must ordinarily be made before the time and place for hearing is set or good cause must be demonstrated for the late filing. Intervention may be granted only if it will not unduly prolong or otherwise prejudice the adjudication rights of the original parties, if the movant will be adversely affected by a final order

and if the interests of the movant are not being adequately represented by the original parties.

Wyoming submits as follows in support of its request: Wyoming states that it wants to address count II of the complaint. That count alleges that when an EPA inspector and a pesticide compliance officer of the Wyoming Department of Agriculture conducted a routine use/misuse FIFRA inspection, on April 20, 1994, at respondent's facility in Douglas, Wyoming they found two pallets of ZP Rodent Bait AG that were misbranded under FIFRA § 2 (q) (1) (B) because

they lacked federal labels required by FIFRA § 25 c and the Wyoming State Registration Section 24 (c). It is alleged that on six occasions in 1993, the respondent sold to Wyoming Certified Applicators ZP Rodent Bait AG without the Wyoming State Registration § 24 © labels. The complaint alleges that this is required by FIFRA § 24 c. The sale of pesticides misbranded under FIFRA § 2 (q) (1) (B), it is alleged, violated FIFRA § 12 (a) (1) (E).

Wyoming urges that EPA misunderstood its special local need criteria, or EPA "deliberately chose to ignore [Wyoming's] authority in the area by imposing a label attachment requirement to a product when the use did not pertain to the special local need." Wyoming believes that complainant "overstepped its authority" and entered an area where only Wyoming has the right "to determine special local needs conditions." Wyoming claims that complainant is not the appropriate decision maker regarding the conditions for § 24 © use. Wyoming concedes that complainant may enforce Section 3 violations but it is the "co-enforcer" with Wyoming for § 24 © violations.

According to James W. Bigelow, the manager of the Technical Services Section, and the custodian of that section, Wyoming Department of Agriculture, the Technical Services Section administers Wyoming pesticide regulation. He states that Wyoming raised, through the State FIFRA Issues Research Evaluation Group, the question about Wyoming's authority in this case with EPA's Office of Pesticide Programs. In response to that inquiry EPA's Director of Toxics and Pesticides Enforcement Division, Office of Regulatory Enforcement stated that "[w]hen a state exercises special local needs (SLN) registration authority under FIFRA section 24 c,, the section 24 © product must fully incorporate all of the section 3 product requirements and labeling. ... [T]he Office of Pesticide Programs *Labeling Alert* Number I dated July 1996 states

clearly that an 'SLN registrant should make sure that the 24 © label is made available to Purchasers who wish to use the product for SLN use'. ...[W]hen

selling a section 24 © registered product for its section 24 © registered use, the product must bear both the section 3 labeling and the section 24 © labeling." The Director stated that the issue posed in this case does not relate to the sale and use of a product with its section 24 © label for a section 3 use but to the sale of a pesticide without its federal label and its section 24 © label when sold for section 24 © use and the misuse of a pesticide by failing to obtain a required clearance from the U.S. Fish and Wildlife Service for black-footed ferrets, or failing to search for ferrets.

It is Wyoming's belief that the EPA Director of Toxics and Pesticides Enforcement Division did not answer its question. It is for that reason that it seeks to intervene in this proceeding. Wyoming urges that it will not delay the proceeding, that its viewpoint will not be adequately represented by the state employee who will testify and that the outcome of the case could undercut Wyoming's authority. Wyoming claims that it will represent not only its interest but that of the public interest. Wyoming represents that it will not unduly delay the proceeding.

Wyoming's statement that it will not unduly delay the proceeding and that it will not prejudice the parties is too vague to credit in assessing the criteria under § 22.1 1. Wyoming has not shown with any specificity how it will add to the evidence that the parties have indicated they will introduce at the hearing. Wyoming has not stated what documents it would introduce that the parties to the proceeding will not. (The documents the parties intend to introduce have already been exchanged; Wyoming could have examined them before making its filing.) In addition, Wyoming has not indicated how many witnesses it would call and what they would provide that would help to determine the factual issues presented by the complaint. There is no

representation by Wyoming that it will present evidence that the parties will not provide. Only with this information could it be determined whether it would complicate the proceeding to such an extent that it would be unduly delayed or prejudice the original parties. Furthermore, Wyoming only speculates that the scheduled state witness will not be familiar with the state and federal regulations in the area he regulates. In any event, this is not a proceeding to raise issues before the Director of Toxics and Pesticides Enforcement Division or influence EPA policy regarding enforcement of FIFRA. If, as Wyoming claims, its policy question was not answered when it was raised through the proper channels, the answer does not rest with raising it in this enforcement proceeding again.

Because the issue that Wyoming raises may involve a legal question involving FIFRA, and the regulations implementing FIFRA, that will be applied in this proceeding, the appropriate way to be heard at this stage of the proceeding would be for Wyoming to move to file an amicus brief.

ACCORDINGLY, IT IS ORDERED that the state of Wyoming's motion for leave to intervene IS DENIED.

Edward J. K

Administrative Law Judge

April 22, 1997

Washington, D. C.