UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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| IN THE MATTER OF | ) |
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| ARAPAHOE COUNTY WEED DISTRICT, | ) DOCKET NO. I.F.& R.-VIII-96-07 |
| | ) |
| | ) |
| RESPONDENT | ) |

Federal Insecticide, Fungicide, and Rodenticide Act--- Sale of a Restricted Use Pesticide to an Uncertified Applicator----Strict Liability

_FIFRA § 12(a)(2)(F), as amended in 1978, prohibits the sale of a restricted use pesticide (RUP) to a noncertified applicator except under regulations promulgated by the Administrator and, notwithstanding the fact that Colorado is one of two states for which the Administrator has issued regulations permitting sales of RUPs to noncertified applicators for use by a certified applicator (40 CFR § 171.11(g)(2)(ii)), sale of a restricted use pesticide to a person whose certification had expired, which did not purport to be made in accordance with the regulation, was a violation of section 12(a)(2)(F) of the Act.

Appearance for Complainant:

Brenda L. Morris, Esq.
U.S. EPA, Region VIII
Denver, Colorado

Appearances for Respondent:

Kathryn L. Schroeder, Esq
Arapahoe County Attorney

Ronald A. Carl, Esq.
Assistant County Attorney
Littleton, Colorado

## INITIAL DECISION

This proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C § 136l(a), was commenced on September 24, 1996, by the filing of a complaint charging Respondent Arapahoe County Weed District (Respondent or Arapahoe) with the sale of a restricted use pesticide (RUP) to an uncertified applicator in violation of Section 12(a)(2)(F) of the Act. For this alleged violation, it was proposed to assess Arapahoe a penalty of $2,400.

In a letter misdated 1-11-1996, filed on October 17, 1996, the Chairman of the Arapahoe County Pest District, Mr. Miles Davies, stated that last September the manager of our Weed District [Mr. Cronk] sold farmer Lowell Piland a small quantity of "TORDON". The letter asserted that both Mr. Cronk and Mr. Piland believed that the expiration date on Mr. Piland's private applicator card was 1996. The letter recited that when it was discovered in March of 1996 that Mr. Piland's card had expired in 1995, he had already applied for a new card on the assumption his card expired in 1996. Mr. Davies alleged that an examination of Mr. Piland's record of the use of the chemical showed that all requirements had been followed and asserted that no harm was intended or incurred. Mr. Davies stated that we feel the [proposed] penalty is excessive, that the money would be better used on noxious weed control and requested a hearing.

A hearing on this matter was held in Denver, Colorado on October 23, 1997.

Based upon the entire record including the proposed findings and briefs of the parties, I make the following

## FINDINGS OF FACT

1. The Arapahoe County Weed District is a government entity, described by Mr. Miles Davies, chairman of its governing board, as a "quasi attachment" to Arapahoe County, organized under the pest control laws of the State of Colorado (Tr. 91, 93). CSR § 35-5-101 defines pests as including "noxious, destructive, or troublesome plants" and Respondent is also known as the "Arapahoe County Weed & Pest Control District".

2. Revenues for the district are obtained from a levy of two mills [per hundred of valuation] on real property (Tr. 90; CRS § 35-5-11). Mr. Davies was one of the organizers of the district. He testified that revenues from the mill levy for this year [1997] would total about $34,000 (Tr. 92). In other testimony, he asserted that the Weed District's budget was approximately $35,000 from tax moneys and $50,000 from the resale of chemicals (Tr. 103).

3. Mr. Davies testified that the governing board of the Weed District served without compensation or expenses and that the district had hired Mr. Rodney Cronk to do the selling [of chemicals] and to keep the records (Tr. 90, 91). He opined that noxious weed control was very expensive, pointing out that Tordon cost $80 a gallon and would treat only a few acres. He explained that revenue from the mill levy, collected by the county, was used to help farmers buy chemicals which were sold at cost plus ten percent for handling. (Tr. 92). Additionally, farmers were given a credit of "half off" up to $500 [on the purchase of chemicals]. Mr. Davies answered "none" when asked if the district made a profit of any kind from the sale of chemicals.

4. Mr. Davies testified that it was the policy of the Weed District to strictly adhere to all laws and regulations [applicable to the handling and sale of chemicals] (Tr. 93). As an example of such adherence, he recounted an incident where Mr. Cronk had refused to sell him a jug of Tordon, because he (Davies) had forgotten his [certified] applicator's card (Tr. 93, 94).

5. Mr. Michael P. Rudy has been an EPA employee since 1992 (Tr. 12). His primary duty for the past five years has been the performance of inspections to determine compliance with FIFRA. On March 6, 1996, he performed a routine dealer RUP inspection at the office of the Arapahoe County Weed District, Strasburg, Colorado (Tr. 12, 16; Memorandum of Inspection, C's Exh 2). The inspection included a review

of records relating to the sale of RUPs. Tordon 22K, EPA Registration No. 62719-6, is the only RUP sold by Arapahoe. (Tr. 17).

6. Mr. Rudy testified that he confined his review to a 24-month period and randomly pulled evidence relating to 12 sales (Tr. 17). Among sales selected was the sale of 7.5 gallons of Tordon 22K to Mr. Lowell Piland on September 2, 1995 (Tr. 18; RUP Sales Log, C's Exh 3 and Sales Ticket, C's Exh 4). These documents reflect that Mr. Piland's certified applicator's certificate expired on May 6, 1996. Upon returning to his office and reviewing a computer printout of all certified private applicators in the State of Colorado, Mr. Rudy determined that Mr. Piland's certification had expired on May 6, 1995 (Tr. 21; Colorado Private Pesticide Applicators, C's Exh 6; Colorado Private Applicator By Name, C's Exh 8).

7. Thereafter, Mr. Rudy conducted a follow-up inspection with Mr. Piland, taking his affidavit (Tr. 24; Affidavit of Lowell D. Piland, dated May 14, 1996, C's Exh 5; Memorandum of Inspection, dated June 17, 1996, C's Exh 9). In his affidavit, Mr. Piland stated that he did not know his certification had expired when he purchased Tordon 22K on September 2, 1995, because his card was smudged. He asserted that either Rodney [Cronk] or himself had called EPA Region VIII to ascertain the expiration date of his certification and expressed the belief that the May 6, 1996 expiration date was provided by EPA. Being of the belief that his certification did not expire until May 1996, Mr. Piland acknowledged that he applied Tordon 22K in the September 1995 time-frame. This application was of Tordon 22K which he had on hand and not that which he purchased on September 2, 1995. Mr. Piland stated that he applied for a new certification in January 1996 and received a new card a few weeks ago [March 1996].

8. Tordon 22K is a restricted use pesticide which may only be sold to, and used by or under the direct supervision of, certified applicators (Tr. 28; Label for Tordon 22K, C's Exh 12; FIFRA § 3(d)(1)(C)).

9. Mr. Rudy testified that he was unaware of any past violations [of FIFRA] by Arapahoe (Tr. 46). To his knowledge, Arapahoe had been inspected only once previously, which was in 1989 and no violations were found.

10. Colorado does not have an approved plan for the training and certification of applicators of restricted use pesticides and the certification program in Colorado is conducted by EPA (Tr. 51; 40 CFR § 171.11(g)). Mr. Rudy testified that he was aware of a problem with EPA applicator cards becoming smudged and that he had seen smudged cards (Tr. 46, 47). He explained that people carry the cards in their wallets, that they are subject to bodily heat and general wear and tear and that sometimes the ink gets smudged. He was aware that EPA had discussed the possibility of laminating the cards or changing the printing so as to reduce the likelihood of smudging, but was not aware that any action had been taken in that regard. In the past, he had helped farmers obtain replacements for badly smudged cards (Tr. 50).

11. Mr. Timothy Osag has been employed by EPA for over 25 years and for eight out of the last ten years has been chief of the pesticide section in Region VIII (Tr. 52, 53). He testified that in Colorado the State certified and monitored the compliance of commercial applicators and that the balance of the FIFRA program was implemented by Region VIII (Tr. 54). Regarding the matters at issue here, Mr. Osag reviewed the inspection reports, discussed the facts with Mr. Rudy, determined that a violation had occurred and that a penalty was appropriate, and calculated the proposed penalty (Tr. 55, 56). For this purpose, he used the Enforcement Response Policy (ERP) For FIFRA (July 2, 1990) (Tr. 59; C's Exh 1).

12. Mr. Osag prepared a penalty calculation narrative and a penalty calculation worksheet (Tr. 58, 59, 60; C's Exh 13). Appendix A of the ERP provides that violations of FIFRA § 12)(a)(2)(F), in that a person distributed, sold, made available for use, or used a restricted use pesticide for a purpose other than in accordance with section 3(d) or regulations [thereunder], are in gravity level 2. Mr. Osag determined the violation at issue here was in gravity level 2. Because Arapahoe is a unit of the Arapahoe County government and tax supported, he placed Respondent in size of business Category III, revenues of $0 to $300,000 (Tr. 61; Penalty Calculation Narrative). Applying a gravity level of 2 to a size of business

Category III, resulted in a base penalty of $3,000 (ERP Penalty Matrix; Penalty Calculation Worksheet).

13. The next step in the penalty calculation is the consideration of Gravity Adjustment Criteria (ERP Appendix B). Mr. Osag assigned Tordon 22K a toxicity value of 2, because it is a restricted use pesticide [carrying the signal word "Danger" on the label] (Penalty Calculation Narrative). Because it appeared that the pesticide had been used in accordance with label directions, he assigned a value of 1 to human harm and a value of 1 to environmental harm. EPA had no record of prior violations by Arapahoe and this criterion was assigned a value of zero. The violation was considered to be the result of negligence for which a culpability value of 2 was assigned (Tr. 64; Penalty Calculation Narrative). These determinations resulted in a total gravity value of 6, for which the ERP specifies a reduction of 20% from the matrix value (Id. 22) or $600 in this instance. This resulted in the penalty claimed of $2,400.

14. Although Arapahoe does not concede that a violation occurred, or that a penalty rather than a simple warning is appropriate, even if there were a violation, it has stipulated that the above numbers, with the exception of the culpability factor of 2, were correctly determined under the ERP (Tr. 62, 63). Mr. Osag maintained, however, that Arapahoe was negligent, because it sold Tordon 22K, a RUP, to Mr. Piland at a time when his certification card was illegible and, therefore, without knowing that he was a certified applicator (Tr. 65, 66). Because he regarded Arapahoe as negligent and because a RUP was involved, he considered the violation as serious, justifying a penalty rather than a warning (Tr. 68). Mr. Osag testified that in December of each year EPA [Region VIII] obtained from a computer generated list, the names of all applicators whose certifications were due to expire in the following year, and sent them a postcard-reminder that their certifications were due to lapse (Tr. 83). He also testified that on request pesticide dealers were able to obtain from EPA a list of all certified applicators for their area by county (Tr. 83, 84). He stated that such a list had been provided Arapahoe subsequent to Mr. Rudy's inspection, but that to his knowledge Arapahoe did not have such a list on September 2, 1995, the date of the sale at issue here.

15. Mr. Rodney Cronk testified that he had been office manager for the Arapahoe County Weed District for 15 years (Tr. 104). His principal task was the sale of chemicals, in particular herbicides for the control of weeds, to farmers. Among the chemicals sold is Tordon [22K], a restricted use pesticide. Mr. Cronk was aware that Tordon could only be sold to certified applicators (Tr. 105). He testified that he had known Mr. [Lowell] Piland for 25 or 30 years and that Mr. Piland had purchased chemicals from the Weed District as long as the district had been in existence (Tr. 106). He stated that Mr. Piland had been a certified applicator for over ten years and that he sold Mr. Piland 7.5 gallons of Tordon on September 2, 1995, because he (Cronk) thought Piland was a certified applicator (Tr. 106-07).

16. Mr. Cronk thought Mr. Piland was a certified applicator because "..we had him on file as having a 96 expiration date." (Tr. 107) This information was maintained in what he referred as a "Rolodex file." Information as to the expiration date of Piland's certification was transferred from the "Rolodex" to the RUP Sales Log (C's Exh 3) which shows the sale of 7.5 gallons of Tordon 22K to Lowell Piland on September 2, 1995, and that Piland's certification expired on May 6, 1996 (Tr. 108-09). Mr. Cronk testified that the information as to the expiration date of Mr. Piland's certification was placed in the "Rolodex" at a time when Piland's card was badly smudged and when both he (Cronk) and Piland were certain the expiration date was 1996 (Tr. 109-10, 114). He did not recall the date this was done.

17. Mr. Cronk testified that his practice was not to sell Tordon to people who were not certified and that in order to avoid such sales "we" started this card file (Tr. 110). He stated that most people carried their cards with them and that his practice at the time of the sale at issue here was to actually look at the purchaser's card. He averred, however, that cards which had been issued a year or two ago and carried in billfolds were difficult to read. He testified that on September 2, 1995, he sold Tordon to Mr. Piland based on the information on the card in his "Rolodex" file (Tr. 111). On cross-examination, Mr. Cronk testified that the last time he saw Mr. Piland's "old card" was on the date of the sale of

Tordon, which was September 2, 1995 (Tr. 115-16).

18. Mr. Piland testified that he had been a certified applicator since it [certification] was required [in order to purchase or apply a restricted use pesticide] (Tr. 117). He explained that he purchased Tordon on September 2, 1995, to take advantage of the half price break offered by the Weed District, intending to store it and use it at a later time (Tr. 118-19). He applied the Tordon purchased on September 2, 1995, in August of 1996 (Tr. 120). Although his certification card was illegible, he believed that he was certified at the time of the purchase based on the information in the "Rolodex", which had been obtained from his card at an earlier time (Tr. 121-22). He first learned that he was not certified on the date of the purchase from Mr. Rudy at the time of Mr. Rudy's inspection. Mr. Piland applied for a new card in January 1996 and obtained it in March of 1996 (Tr. 123-24). He had the [new] card in his possession at the time of Mr. Rudy's inspection [in May 1996].

19. Although Mr. Piland was positive that Rodney [Cronk] had placed the inaccurate May 6, 1996 expiration of his (Piland's) card in the Rolodex and that this would have been done in his presence, he had no independent recollection of this event (Tr. 126-27, 128). He stated, however, that he knew that the information in the Rolodex came from his card and that because the card "had a little smudge or something" a 5 [had been read] and recorded as a 6 (Tr. 128). Regarding the statement in his affidavit to the effect that he or Rodney Cronk had called EPA to ascertain the expiration date of his card, Mr. Piland testified that upon reflection the call must have [concerned another purchase] and been made by Roggin's Elevator in Bennet, [Colorado], another place where he sometimes purchased chemicals. He asserted that he could not find his old card at the time of Mr. Rudy's inspection, stating that he was sure it had been discarded when he received his new card.

## Conclusions

1. Arapahoe's sale on September 2, 1995, of Tordon 22K, a restricted use pesticide, to Lowell Piland, who was not a certified applicator on the date of the sale, was a violation of FIFRA § 12(a)(2)(F), 7 U.S.C. § 136j(a)(2)(F).

2. FIFRA is a strict liability statute and no finding of intent to violate the Act or to act in disregard thereof is required in order for the violator to be liable for a penalty.

3. The violation is serious and warrants a penalty rather than simply a warning.

4. An appropriate penalty is the sum of $2,400.

## Discussion

FIFRA § 12(a) provides in pertinent part:

> (2) It shall be unlawful for any person ___
>
> (F) to distribute or sell, or to make available for use, or to use any registered pesticide classified for restricted use for some or all purposes other than in accordance with section 136(a)(d) of this title and any regulations thereunder, except that it shall not be unlawful to sell, under regulations issued by the Administrator, a registered pesticide to a person who is not a certified applicator for application by a certified applicator;[(1)]

To date, the Administrator has only issued regulations allowing the sale of RUPs to uncertified applicators for use by certified applicators in states, Colorado and Nebraska, and on Indian reservations, where the Administrator conducts the applicator certification and training program (40 CFR § 171.11(g)).

FIFRA § 3(d), 7 U.S.C. § 136(a)(d) referred to in section 12(a)(2)(F), concerns the classification of pesticides for general use, restricted use or both and, insofar

as pertinent here, provides that restricted use pesticides and any use for which the restricted classification applies shall be applied only by or under the direct supervision of a certified applicator. There is no allegation or evidence that the sale at issue here was made or intended to be made under the regulation, applicable in Colorado, allowing the sale of a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator. Among conditions precedent for the exception to apply is documentation that the RUP will be used by a certified applicator and the maintenance of certain records which include the name and address of the purchaser and of the certified applicator. 40 CFR § 171.11(g)(2)(ii)). There could, of course, be no such evidence here, because Arapahoe's position, and the testimony, is that both Mr. Cronk and Mr. Piland thought Mr. Piland was a certified applicator at the time of the sale.

Citing Webster's New World Dictionary, Arapahoe points out that "purpose" means "intention" and argues that in order to establish a violation of FIFRA § 12(a)(2)(F) Complainant must prove that someone intended to use Tordon in a manner inconsistent with [7 U.S.C.] § 136(a)(d) (Brief at 5). This argument has some force because section 12(a)(2)(F) prior to the 1978 amendment simply made it unlawful for any person to "make available for use" or to "use" any registered pesticide classified for restricted use for some or all purposes other than in accordance with section 3(d) and any regulations thereunder. "Make available for use" for purposes other than in accordance with section 3(d) implies, if it does not require, intention because there is no indication that the mere possession of a RUP by a person who is not a certified applicator is prohibited. It is therefore clear that the primary concern of § 12(a)(2)(F) is the use of RUPs for purposes other than in accordance with section 3(d), i.e., by persons who were not certified applicators. The seller is required to assure himself that the RUP is intended for use only by or under the direct supervision of a certified applicator, but may not be regarded as an ensurer of such use. Because intent that the RUP be properly used, i.e., by or under the direct supervision of a certified applicator, is a necessary element of a legal sale of the RUP, it is at least prima facie reasonable to regard a showing of intent that the RUP be not so used, or in reckless disregard of proper use, in order to establish a violation of section 12(a)(2)(F) by the seller.

The Senate Committee Print on the Federal Pesticide Act of 1978 provides some support for the above view for it emphasizes that the prohibition in FIFRA § 12(a)(2)(F) is concerned with improper use, which insofar as the seller of the RUP is concerned may not be separated from the intended use, and describes the difference between section 12 prior and subsequent to the amendments thusly:

(w)ith respect to the prohibition against improper use of restricted use pesticides, a proviso is added that it will not be unlawful to sell, under the Administrator's regulations, a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator.[(2)]

Be the foregoing as it may, Arapahoe's argument is foreclosed by Custom Chemical & Agricultural Consulting, Inc. and David H. Fulstone II, FIFRA Appeal No. 86-3, 2 EAD 748 (CJO, March 6, 1989), wherein it was held that FIFRA § 12(a)(2)(F), as amended in 1978, flatly prohibited making a restricted use pesticide available to a noncertified applicator, the only exception being that the sale of a restricted use pesticide to someone who is not a certified applicator for use by a certified applicator was authorized under regulations promulgated by the Administrator.[(3)] Although Colorado is one of two states for which such regulations have been issued, this exception is not applicable here for reasons previously stated. Custom Chemical, supra does not specifically address the argument advanced by Arapahoe that the language for "for some or all purposes other than in accordance with section 3(d)" in section 12(a)(2)(F) necessarily implies or requires a finding of intent to establish a violation of the latter section. The CJO's flat holding, however, that "FIFRA § 12(a)(2)(F), as amended in 1978, does not permit the sale of restricted use pesticides to uncertified applicators until the Administrator has issued regulations" (2 EAD at 751), rejects, by necessary implication, any contention that intent is an element of a violation of the cited section.

Appropos the foregoing, FIFRA has repeatedly been held to be a strict liability statute. See, e.g., South Coast Chemical, Inc., FIFRA 84-4, 2 EAD 139 (CJO, March 11, 1986) (requirement that a pesticide be produced in a registered establishment and be registered prior to its distribution or sale); Kay Dee Veterinary, Division of Kay Dee Feed Company, FIFRA Appeal No. 86-1, 2 EAD 646 (CJO, October 27, 1988) (sale of a pesticide in violation of a cancellation order); Helena Chemical Company, FIFRA Appeal No. 87-3, 3 EAD 26 (CJO, November 16, 1989), On Motion For Reconsideration, 3 EAD 83 (January 24, 1990) (sale of a RUP to a noncertified applicator held to be a violation of section 12(a)(2)(F), while intent was necessary to show a violation of section 12(a)(2)(M), which makes it unlawful to, inter alia, "knowingly" falsify any record required to be maintained by this subchapter);[(4)] and Green Thumb Nursery, Inc., FIFRA Appeal No. 95-4a, 6 EAD 782 (EAB, March 6, 1997) (strict liability for the sale of an unregistered pesticide).[(5)]

It is concluded that the sale by Arapahoe on September 2, 1995 of Tordon 22K, a restricted use pesticide, to Lowell Piland, who was not a certified applicator on the date of the sale, constituted a violation of FIFRA § 12(a)(2)(F), 7 U.S.C.§ 136j(a)(2)(F).

The next issues to be addressed are whether, as contended by Arapahoe, a warning rather than a penalty is appropriate, and if that question is answered in the negative, the amount of an appropriate penalty. Arapahoe points out that, because the Tordon 22K purchased by Mr. Piland on September 2, 1995, was not applied until August 1996, at which time Piland's certification had been renewed, no harm resulted from the violation and that, under such circumstances, the only justification for assessing a fine is its deterrent value (Brief at 7, 8).

Because Arapahoe assertedly takes great care to assure that the law is followed and because it now relies at least in part on lists of certified applicators distributed by EPA, Arapahoe asserts that problems attributable to smudged applicator cards have been rectified and that there is no basis for the assumption that a fine is necessary to prevent further violations. This argument would be sound except for the fact that the deterrent value of a sanction is not directed solely at the violator against whom the fine or penalty is assessed, but also is intended generally to discourage casual attitudes toward compliance with the law and to act as a deterrent to similar violations by others. In amending section 12(a)(2)(F) in 1978, Congress must have concluded that the risk a restricted use pesticide might be applied by a noncertified applicator would be enhanced, if sales of restricted use pesticides to persons who were not certified were permitted, other than under regulations promulgated by the Administrator. It is concluded that a penalty rather than a simple warning is the appropriate sanction here.

Turning to the penalty, which was computed in accordance with the ERP, there appears to be no dispute that, because a RUP is involved, the gravity of the violation was properly determined to be Level 2 and that in terms of revenue, Arapahoe was properly placed in Category III, revenues of $0 to $300,000.[(6)] These determinations, applied to the penalty matrix (ERP at 19), resulted in a gravity based penalty of $3,000. There is no indication or allegation that a penalty of this magnitude will jeopardize Arapahoe's ability to remain in business. There also appears to be no dispute that, insofar as gravity adjustment criteria are concerned (ERP, Appendix B), a toxicity value of 2 was proper and human harm and environmental harm were each considered to be minor and properly assigned values of 1. The violation was considered to result from negligence for which a culpability value of 2 was assigned, resulting in a total gravity value of 6 for which the ERP specifies a 20% reduction from the matrix value or $600 in this instance (finding 13).

Arapahoe has disputed the culpability factor of 2, contending that no negligence was involved, because Mr. Cronk's belief that the expiration date on Mr. Piland's card was 1996 was reasonable (Brief at 8). Although Mr. Cronk testified that he saw Mr. Piland's card on September 2, 1995, the date of the sale (finding 17), the crux of his testimony is that he made the sale based on information in his "Rolodex file" which showed the expiration date of Mr. Piland's certification as May 6, 1996

(finding 16). Information had been transferred to the "Rolodex" from Mr. Piland's badly smudged card at an earlier time when both Mr. Cronk and Mr. Piland were allegedly certain that the expiration date was 1996 (Id.). Under these circumstances, Mr. Cronk was negligent when he misread the badly smudged card in transferring information to the "Rolodex" and/or when he proceeded with the sale at a time when he could not have been certain that Mr. Piland was a certified applicator. It follows that the culpability value of 2 was properly assigned, thus making the total ERP gravity value 6.

A gravity value of 6 results in a 20% reduction from the matrix value (ERP at 22), which in this instance is $600. Arapahoe has not shown that it is entitled to a further reduction and the penalty proposed of $2,400 will be assessed.

Order

It having been determined that Arapahoe County Weed District violated FIFRA § 12(a)(2)(F) as alleged in the complaint, a penalty of $2,400 is assessed against it in accordance with section 14(a)(1) of the Act (7 U.S.C. § 136l(a)(1)).[7] Payment of the penalty shall be made by mailing or delivering a certified or cashier's check in the amount of $2,400 payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

Regional Hearing Clerk
U.S. EPA, Region VIII
P.O. Box 360859
Pittsburgh, PA 15251-6859

Dated this 9th day of June 1998.

Original signed by undersigned

_____

Spencer T. Nissen
Administrative Law Judge

1. The proviso "except that it shall not be unlawful to sell, under regulations issued by the Administrator, a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator" was added to § 12(a)(2)(F) by section 16 of the Federal Pesticide Act of 1978, P.L. 95-396, September 30, 1978. The words "to distribute or sell, or to make" were added to section 12(a)(2)(F) by the Federal Insecticide, Fungicide, and Rodenticide Act Amendments of 1988, P.L. 100-532, October 25, 1988.

2. Committee Print, Federal Pesticide Act of 1978, Committee On Agriculture, Nutrition, And Forestry, United States Senate, 95th Congress, 2d Session, at 225. While it might be argued that "improper use" in this context includes an improper sale, this is contrary to the usual understanding of "use" and is considered to be unlikely.

3. Custom Chemical involved RUP sales in Nevada and no regulations authorizing sales of RUPs to persons who were not certified applicators for use by certified applicators had been issued. The CJO recognized the argument that section 3(d)) in conjunction with (12)(a)(2)(F), prior to the amendment, allowed the sale of a restricted use pesticide to a person who was not a certified applicator for use by a certified applicator, because section 3(d) only prohibited the application of RUPs by persons who were not certified applicators and did not restrict their purchase or sale. 2 EAD at 751 (note 7). He held, however, that section 12(a)(2)(F) as amended only permitted the sale of RUPs to persons who were not certified applicators under regulations promulgated by the Administrator. Because no such regulations had been issued, the sales were in contravention of the Act.

4. Although section 12(a)(2)(M) which makes it unlawful to "knowingly" falsify, inter alia, "all or any part of an application for registration,... any records required to be maintained by this subchapter..", seemingly strengthens the argument that intent is not an element of other unlawful acts listed in section 12, Arapahoe contends that Congress, by use of the word "purposes" in section 12(a)(2)(F), accomplished the same result, eliminating strict liability for noncompliance with that section. See also section 12(a)(2)(R) making it unlawful "to submit to the Administrator data known to be false in support of a registration." As indicated, Arapahoe's contention is foreclosed by Custom Chemical, supra.

5. Because whether a substance is a pesticide is largely a function of its intended use (FIFRA § 2(u); 40 CFR § 152.15), it seems anomalous to regard questions of intent as irrelevant to whether the Act has been violated. The precedent cited in the text, however, requires the conclusion that, except for section 12(a)(2)(M), which uses the word "knowingly" and section 12(a)(2)(R), which uses the word "known", violations of FIFRA § 12 are not dependent on the violator's intent.

6. Finding 12; Stipulation, finding 14. Under the Rules of Practice (40 CFR Part 22), I am required to consider, but not necessarily to follow any penalty guidelines issued under the Act (Rule 22.27(b)).

7. Unless this decision is appealed to the Environmental Appeals Board (EAB) in accordance with Rule 22.30 (40 CFR Part 22), or unless the EAB elects to review the decision sua sponte as therein provided, this decision will become the final order of the EAB and of the Agency in accordance with Rule 22.27(c).