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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

1991 DEC 18 AM 6:30

IN THE MATTER OF	)	
	)	
AG-SUPPLIERS, INC.,	)	IF&R Docket No. III-401-C
	)	
Respondent	)	

1. FIFRA: Section 12(a)(2)(J): The distribution of registered pesticide products containing the active ingredient dinoseb in violation of an Emergency Suspension Order and Notice of Intent to Cancel which had prohibited all further sale, distribution and use of such pesticide products constitutes a violation of Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J).

2. FIFRA: Section 12(a)(2)(J): Title to the pesticide products passed and, hence, the prohibited distribution occurred, when the President and sole owner of Respondent corporation made the decision voluntarily and without consideration deemed valuable at law to transfer the pesticide products from Respondent corporation to himself for application on his personally-owned farms.

3. FIFRA: Section 12(a)(2)(J): The distribution of two separately registered pesticide products containing the same hazardous chemical is considered to constitute two separate violations of FIFRA and to warrant separate penalties.

4. FIFRA: Section 14(a): Where, at the time of a prohibited distribution of certain pesticide products, Respondent has knowledge of an Emergency Suspension Order and Notice of Intent to Cancel which had prohibited all further sale, distribution and use of such products and knowledge of a State Stop Sale, Use, Removal or Seizure Order applicable to those products in its possession, such distribution constitutes a knowing or willful violation of the statute.

Appearances:

For Complainant:

Hilda E. Burgos, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

For Respondent
(appearing pro se):

George L. Thorpe, Sr.
President
Ag-Suppliers, Inc.
P.O. Box 129
Newsoms, Virginia 23874

Before: Henry B. Frazier, III
Chief Administrative Law Judge

INITIAL DECISION

I. Background - Violations Alleged:

This is a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended, 7 U.S.C. § 136 et seq. An administrative complaint was issued on August 27, 1990, by the United States Environmental Protection Agency (EPA, Complainant or Agency) alleging that Ag-Suppliers, Inc. (Respondent or Ag-Suppliers) had violated Section 12 of FIFRA, 7 U.S.C. § 136j.

More specifically, the complaint alleged in two counts that Respondent had violated Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J), by distributing two registered pesticide products containing the active ingredient dinoseb in violation of an Emergency Suspension Order and Notice of Intent to Cancel (Emergency Suspension Order) which had prohibited all further sale, distribution and use of dinoseb pesticide products.

The complaint also alleged in two additional counts that Respondent had violated Section 12(a)(2)(K) of FIFRA, 7 U.S.C. § 136j(a)(2)(K), by distributing two dinoseb pesticide products after the issuance of a Final Cancellation Order. On May 17, 1991, Complainant filed a Notice of Intent to amend the complaint and to withdraw these latter allegations.

A motion to amend the complaint together with an amended complaint was filed with Complainant's post-hearing submissions. The amended complaint alleged in six counts that Respondent violated Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J), by distributing each of two dinoseb pesticide products on three

separate days in May 1988 in violation of the Emergency Suspension Order.

In summary, the Complainant seeks, in the motion to amend the complaint, to withdraw the two counts alleging violations of 7 U.S.C. § 136j(a)(2)(K) and to divide (or should I say multiply?) the two allegations stated in the remaining initial counts alleging violations of 7 U.S.C. § 136j(a)(2)(J) into six counts - one per registered pesticide per day. For each of these six alleged violations Complainant proposes a penalty of $5,000 per violation or a total penalty of $30,000.

II. Background - Processing of the Case:

A hearing was held in this matter on May 29, 1991, in Courtland, Virginia. Mr. George Thorpe, Sr., President of Ag-Suppliers, appeared pro se for Respondent. Thereafter, on July 24, 1991, Complainant submitted its proposed findings of fact, conclusions of law and brief in support thereof, together with the motion to amend the complaint. Respondent submitted a motion to deny Complainant's motion to amend the complaint, together with its proposed findings of fact, conclusions of law and brief in support thereof on August 13, 1991. Complainant filed a response on August 29, 1991.

III. Findings of Fact:

Many of the facts in this matter are not in dispute. In its proposed findings of fact, Respondent adopted many of Complainant's proposed findings of fact. Based upon the respective submissions

of the parties, I adopt the following findings of fact upon which there is evident agreement between the parties:

1. Respondent is a corporation incorporated in the Commonwealth of Virginia, whose revenues exceeded $1 million during the calendar year 1989. (Complainant's and Respondent's Proposed Findings, at paragraphs 1 and 2.)

2. On October 7, 1986, pursuant to Section 6(c)(3) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. Section 136d(c)(3), EPA issued an Emergency Suspension Order and a Notice of Intent to Cancel for all registered pesticide products containing the active ingredient dinoseb. (51 Federal Register 36634, 36650, October 14, 1986.) The Order immediately prohibited all further sale, distribution, and use of dinoseb pesticide products. (Complainant's and Respondent's Proposed Findings, at paragraph 3.)

3. Dinoseb pesticides are associated with chronic health effects, such as mutagenicity, oncogenicity, and teratogenicity. (Complainant's and Respondent's Proposed Findings, at paragraph 4.)

4. "Ancrack" (EPA Registration Number 19713-23) and "Dynamyte 3" (EPA Registration Number 19713-82) are pesticide products that contain dinoseb. (Complainant's and Respondent's Proposed Findings, at paragraphs 5 and 6.)

5. On November 7, 1986, Delbert Whitehead, an inspector employed by the Virginia Department of Agriculture and Consumer Services (VDACS), and duly authorized to conduct inspections under FIFRA, conducted an inspection at Respondent's facility located in

Newsoms, Virginia, and issued a State Stop Sale, Use, Removal, or Seizure Order to Respondent with respect to 29 five gallon cans of "Dynamyte 3" and 194 five gallon cans of "Ancrack." (Complainant's and Respondent's Proposed Findings, at paragraphs 7 and 8.)

6. In May 1987, EPA mailed a package to all companies that had been issued State Stop Sale, Use, Removal, or Seizure Orders with respect to dinoseb products they were holding. That package included, among other things, a cover letter, instructions on safely and properly storing dinoseb products pending disposal, and information on indemnification and disposal assistance. (Complainant's and Respondent's Proposed Findings, at paragraph 9.)

7. Respondent received a copy of the above described May 1987 package sent out by EPA. (Complainant's and Respondent's Proposed Findings, at paragraph 10.)

8. In May 1988 the 29 five gallon cans of "Dynamyte 3" and the 194 five gallon cans of "Ancrack" were transferred from Ag-Suppliers to Mr. George L. Thorpe, Sr. to be used on his farms. (Respondent's Proposed Findings, at paragraphs 11 and 13, Complainant's Reply Brief, at paragraph 4.)

9. At the time of the transfer, Mr. George Thorpe, Sr. and other employees of the Respondent were aware of the fact that EPA had issued an Emergency Suspension Order prohibiting the sale, distribution or use of dinoseb products. (Complainant's Proposed Findings, at paragraph 14, and Respondent's Proposed Findings, at paragraph 18.)

10. At the time of the transfer, Respondent's president was aware of the fact that VDACS had issued a Stop Sale, Use, Removal, or Seizure Order to the company with respect to 29 five gallon cans of "Dynamyte 3" and 194 five gallon cans of "Ancrack" that were in the Respondent's possession at the time. (Complainant's Proposed Findings, at paragraph 15, and Respondent's Proposed Findings, at paragraph 18.)

11. On June 9, 1988, EPA issued a Final Cancellation Order pursuant to Section 6(b) of FIFRA, 7 U.S.C. Section 136d(b), and 40 C.F.R. Sections 164.91 and 164.103, canceling all remaining dinoseb registrations not already canceled as a result of the October 7, 1986 Notice of Intent. (Complainant's Proposed Findings, at paragraph 16, and Respondent's Proposed Findings, at paragraph 18.)

12. On April 12 and 16, 1990, Robert D. Christian, an inspector employed by VDACS, and duly authorized to conduct inspections under FIFRA, conducted an inspection and investigation of Respondent's facility located in Newsoms, Virginia. (Complainant's Proposed Findings, at paragraph 17, and Respondent's Proposed Findings, at paragraph 18.)

13. During the April 1990 inspections, Inspector Christian observed that no "Ancrack" or Dynamyte 3" was in the possession of the Respondent. (Complainant's and Respondent's Proposed Findings, at paragraph 18.)

On the basis of the entire record, including the testimony elicited at the hearing, the exhibits received in evidence and the

submissions of the parties, and giving such weight as may be appropriate to all relevant and material evidence which is not otherwise unreliable, I make the additional findings of fact which follow. Each matter of controversy has been determined upon a preponderance of the evidence. All contentions and proposed findings and conclusions submitted by the parties have been considered, and whether or not specifically discussed herein, those which are inconsistent with this decision are rejected.

14. The information on storage indemnification and disposal assistance which Respondent received included the April 15, 1987 Notice which had been published in the Federal Register (52 Fed. Reg. 12352). At that time, EPA did not have funds allocated to make indemnification payments or to provide Federal disposal but assured the public that it was vigorously pursuing resolution of these issues. The Notice required each owner of dinoseb products (such as Respondent) to make every reasonable effort to return the material to the manufacturer, distributor, or other agents capable of relabeling, recovering, recycling or reprocessing the material. The Notice included an exhortation encouraging registrants/suppliers to take back suspended or canceled dinoseb products from their customers because, as the Press Release issued in conjunction with the Notice said, "the registrants and manufacturers generally have more appropriate storage facilities and more knowledge about safe storage," and "because of the corrosive nature" of dinoseb. The Notice required

those who were holding dinoseb products to follow certain prescribed storage practices. As the Press Release said:

> The agency recommends that dinoseb materials be stored on pallets or similar raised platforms in a dry, well-ventilated, and separate room, building, or covered area with a concrete floor where fire prevention is provided. Movement or handling should be kept to an absolute minimum. Until the agency accepts the suspended and cancelled products for disposal, proper storage of these products is the responsibility of the party holding them. More details on appropriate storage will be provided with the claim forms.
>
> EPA is currently in the process of obtaining a contractor to dispose of dinoseb.
>
> The proposed cancellation of some dinoseb products is being contested in a hearing and therefore these products are not eligible for indemnification or disposal at this time. Nevertheless, the agency is planning for the ultimate indemnification and disposal of these products should the hearing result in a decision to cancel them . . . .

The Notice also required the proper maintenance of containers stating: "If any of the containers are not in good condition, the contents should be placed in a suitable container and properly relabeled. All containers should be checked carefully to ensure that the lids and bungs are tight and the integrity is satisfactory. Containers should be checked regularly for corrosion and leaks. If such is found, the container should be transferred to a sound, suitable, larger container and be properly labeled." (Compl. Exh. 8.)

15. In addition to the delay in the indemnification and disposal process created by the cancelation hearing, EPA had to develop disposal technology for dinoseb. The technology research

took some time. After selecting incineration as the safest and the most effective, efficient and economical manner of disposal, an incineration facility had to be identified or constructed and a permit for such a facility issued. This required additional time. Because the quantity of the existing stock of dinoseb was so large, it was still being accepted for disposal as of May 1991. (Tr. 69-71.)

16. In the summer of 1987 some of Respondent's containers of the "Ancrack" and "Dynamyte 3" were leaking due to corrosion. Mr. George Thorpe, Sr. and Mr. George Thorpe, Jr. transferred the dinoseb pesticides from the leaking containers into some empty five gallon "liquid sulfur" pails which had been washed out and used for that purpose. (Tr. 83-84, 92, 115.)

17. In 1988 other containers of the "Ancrack" and "Dynamyte 3" pesticides were oozing and leaking due to corrosion. Some of these dinoseb products had leaked into, and between the cracks of, the wooden floor of the warehouse in which they were stored. (Tr. 84-85, 87-88, 102; Respondent's Exhibits (Resp. Exhs.) 1-A, 1-E and 1-F.)

18. Mr. George Thorpe, Sr. was concerned that the dinoseb products might leak from their containers, through cracks in the wooden floor of the warehouse and onto the ground below. From there Mr. Thorpe thought it would be possible for the dinoseb to get into a stream some 24 feet 6 inches behind the warehouse. At times during heavy rain storms, the stream has risen out of its banks and up the slope of ground behind the warehouse until it has

been under the warehouse. The stream flows into the Nottoway River. (Tr. 88-89, 111-12, Resp. Exhs. 1-B, 1-C, 1-D, 1-G, 1-H, and 1-I.)

19. Mr. George Thorpe, Sr. had contacted the distributor, Coastal Chemical Company (Coastal), concerning the possible return of the suspended products. Coastal's agent advised that Coastal had no authorization to take the dinoseb products back because the producer, Drexel Chemical Co. (Drexel), would not take the products back from Coastal. (Tr. 110.)

20. Mr. Elmer Wilson, who served as an accountant for Ag-Suppliers from February 1, 1988 until March 31, 1991, telephoned Drexel in North Carolina, soon after he joined the company, concerning the status of the indemnification program for dinoseb products. Drexel advised that they had no plans to pick up the material. Mr. Wilson also called EPA concerning the status of the indemnification program, but EPA had no further information beyond that which had been issued previously and received by Respondent. EPA had no information concerning any possible pickup of the material. (Tr. 100-02.)

21. Mr. George Thorpe, Sr., as owner and President of Ag-Suppliers, Inc., made the decision to transfer the dinoseb products to himself as owner of Oakland Farms. (Tr. 110, 111, 114.)

22. After Mr. George Thorpe, Sr. decided to transfer the dinoseb products to himself as owner of Oakland Farms, Mr. Johnny Butler, manager of Oakland Farms, drove the tank truck from the farms to the warehouse to pick up the dinoseb products.

Mr. George Thorpe, Jr., an employee of Ag-Suppliers, assisted Mr. Butler in loading the truck at the warehouse. Mr. Butler picked up the products over at least a three-day period. (Tr. 82, 84, 93-94, 96, 113.)

IV. Contentions of the Parties:

A. The Complainant's Contentions

Complainant alleges that the transfer of the "Ancrack" and the "Dynamyte 3" by Ag-Suppliers to Mr. George Thorpe, Sr. is in violation of Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J) because it constituted distribution in violation of the Emergency Suspension Order.

Complainant contends that each day that each of the two registered dinoseb products was delivered to Mr. Thorpe Respondent committed two separate violations of FIFRA. Since the deliveries were made on three separate days and since two registered products were involved, there were six distinct violations of FIFRA according to the EPA Enforcement Response Policy (ERP) for FIFRA (July 2, 1990) provision stating that each shipment of a product by registration number is considered a violation.

Complainant maintains that the fact that Respondent transferred the dinoseb products to its owner and president, and not to an outside third party, does not minimize the gravity of the violation. It insists that each sale or distribution of each separate registration of a product containing a suspended pesticide ingredient constitutes a separate violation of the Emergency Suspension Order regardless of the recipient of the product.

Complainant urges the rejection of Respondent's attempt to justify the transfer of the dinoseb products because Respondent had other options to avoid violating the law and was well aware of those options.

Complainant submits that a civil penalty in the amount of the statutory maximum of $5,000 should be imposed for each violation which would result in a total penalty amount of $30,000. Complainant insists that it was appropriate for EPA to utilize the July 2, 1990 FIFRA ERP to calculate the proposed penalty in this matter because the complaint was issued after the date of the ERP. In calculating the penalty amount Complainant asserts that Respondent's violations resulted in potential serious or widespread harm to human health and were knowing or willful.

B. Respondent's Contentions

Respondent states that Mr. George L. Thorpe, Sr., as President and owner of Ag-Suppliers decided to transfer all dinoseb products to himself to be used on his personally-owned farms in order to dispose of the dinoseb. It was not sold to the public.

Respondent insists that this constituted a single transfer of all of the dinoseb material at one time to one person, the owner of the Respondent, which transfer was not a sale. It was not necessary for the material to be delivered or used to reach the farm fields for ownership to transfer since it was already in "his warehouse." Respondent argues that regardless of whether the transfer is viewed as having taken place on one day or over three

days, it was nevertheless a single ongoing violation and should be treated as one violation.

Respondent further maintains that the violation here should constitute a single violation because all of the material, regardless of the brand name of the mixture, contained the single chemical which had been determined to be hazardous - dinoseb.

Respondent contends that although it did violate EPA rules, it was a victim of circumstances created by EPA which then took EPA four years to resolve, during which EPA offered no help, assistance or guidelines to dealers such as Respondent, whose containers of dinoseb products were deteriorating, disintegrating and leaking the hazardous material into the environment.

Respondent pleads that the 1990 FIFRA ERP should not be applied because the ERP became effective more than two years after the violation herein and further, that the earlier ERP was, according to Complainant's own admission, "very vague."

V. Discussion and Conclusions:

A. The Liability Issue and the Motion to Amend the Complaint

The basic facts of this case are not in dispute. Respondent has admitted that it transferred 194 five gallon cans of "Ancrack" and 29 five gallon cans of "Dynamyte 3," each containing the active ingredient dinoseb, to Mr. Gregory Thorpe, Sr. in May of 1988. Respondent, Ag-Suppliers, Inc. is a "person" within the meaning of Section 2(s) of FIFRA, 7 U.S.C. § 136(s) where person is defined as "any individual, partnership, association, corporation or any organized group of persons whether incorporated or not."

At the time of the transfer, the Emergency Suspension Order, which had been issued by EPA pursuant to 7 U.S.C. § 136(d)(c)(3), prohibited all further sale, distribution and use of dinoseb pesticide products. The transfer by Respondent of these registered pesticide products in violation of the Order violated Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J). That provision of FIFRA makes it unlawful for any person "to violate any suspension order issued under section . . . 136(d) . . . ." Therefore, I conclude that Respondent violated Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J).

The question in dispute is whether the transfer constituted a single violation of FIFRA, as Respondent contends, or as many as six separate violations, as Complainant urges.

EPA's Emergency Suspension Order prohibited the sale, distribution and use of any pesticide product containing dinoseb. "Respondent's transfer" of the "Ancrack" and "Dynamyte 3" to Mr. George Thorpe, Sr., as owner of Oakland Farms, constituted "a distribution" in violation of the Order. "To distribute or sell" is defined in 7 U.S.C. § 136(gg) as "to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver."

In this case Mr. George Thorpe, Sr. decided to transfer the pesticide products containing dinoseb from his personally-owned corporation, Ag-Suppliers, Inc., to himself as owner of Oakland

Farms for application on the peanut acreage on those farms.[1] The question of when the title to the products passed from Respondent to Mr. George Thorpe, Sr. must be resolved by reference to state law.[2] Under both the Uniform Commercial Code in Virginia and earlier Virginia decisions, the time at which title to personalty passes is governed by the intention of the parties.[3] Therefore, the time at which title to these pesticide products passed from Ag-Suppliers, Inc., to Mr. George Thorpe, Sr., as owner of Oakland Farms must be determined by Mr. Thorpe's intentions.

"The intention of the parties may appear from the express terms of a formal contract, or may be gathered from all the circumstances constituting the contract or surrounding its completion."[4] In this case, there was no formal contract. There were no documents of sale. Indeed, there was no actual "sale." Here the "parties" to the transfer consisted solely of one person, Mr. George Thorpe, Sr., acting as both "parties" to the transaction. The facts and circumstances surrounding this transaction must be examined in order to ascertain Mr. Thorpe's intentions.

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[1]Tr. 110-12, 114.

[2]Guild Trust v. Union Pacific Land Resources Corp., 682 F.2d 208, 212 (10th Cir. 1982); United States Environmental Protection Agency v. New Orleans Public Services, Inc., 826 F.2d 361, 364 (5th Cir. 1987).

[3]Birdsong & Co. v. American Peanut Co., 149 Va. 755, 766, 141 S.E. 759, 762 (1928). See also, Va. Code Ann. § 8.2-401 (1950), "Virginia Comments".

[4]Birdsong, 149 Va. at 766, 141 S.E. at 762.

The conveyance of this property, the pesticide products, was voluntary and without consideration deemed valuable at law. (Respondent's CPA had advised Respondent that because of the suspension and because the details of the indemnification program were unknown, the products had no value for inventory purposes.[5]) Under Virginia law, title may pass although the goods are still in the possession of a seller and something, such as delivery, remains to be done.[6] After Mr. Thorpe made his decision and informed Mr. Johnny Butler, the manager of Oakland Farms, and Mr. George Thorpe, Jr. of that decision, the only thing that remained to be done was for Mr. Butler to pick up the pesticide products for use on the farms.

Complainant would have me find that each day Mr. Butler picked up some of either of the prohibited products constituted a separate act of "distribution" by Ag-Suppliers. That I cannot do. Mr. Thorpe had made his decision to transfer the pesticide products from Ag-Suppliers to himself as owner of Oakland Farms and had so informed his employees at both places before the pick up began. I hold that title to the pesticide products passed and the prohibited "distribution" occurred when Mr. Thorpe made his decision to transfer the pesticide products from Ag-Suppliers to himself as owner of Oakland Farms.

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[5]Tr. 106.

[6]Drewry v. Baugh and Sons, Inc., 150 Va. 394, 403-05, 143 S.E. 713, 716 (1928); See also, Va. Code. Ann. § 8.2-401 (1950), "Virginia Comments".

Title thereafter was vested in Mr. Thorpe as owner of Oakland Farms. In that capacity, he simply directed Mr. Butler, his farm manager, to pick up the products belonging to himself as owner of the farms from the warehouse owned by himself as President and owner of Ag-Suppliers.

Mr. Butler made several trips in the truck from the farm to the warehouse to pick up the dinoseb products. Each time he picked up only that quantity which, when properly mixed with water in the tank on the truck, would make a single tank load of spray. Mr. George Thorpe, Jr. was at the warehouse and helped Mr. Butler put the dinoseb products on the truck.[7] The fact that Mr. Butler picked up the products on several separate occasions for convenience in mixing and applying the dinoseb does not dictate the time at which title to the products passed.

The record is clear that Mr. George Thorpe, Sr. made the decision to transfer title of the entire quantity of the dinoseb products to himself as owner of Oakland Farms. Mr. Butler was simply carrying out the ministerial duty of picking up the products. Had there been some evidence that Mr. Butler possessed discretion to elect to pick up and use some, but not all, of the product, the question of the time at which the title to the product passed may have been answered differently. However, no evidence was introduced to show that Mr. Butler possessed any such discretion. He simply did what he had been instructed to do - to pick up and use the entire quantity of the dinoseb products.

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[7]Tr. 93.

The actions of Mr. Butler in no way constituted transfer of title to this personalty. Indeed, Mr. Butler had no authority to perform any act as an agent of Ag-Suppliers to convey title; he was an employee of Oakland Farms. Mr. Butler had no authority to secure this property for use at Oakland Farms without Mr. George Thorpe, Sr. as Respondent's President first deciding to convey title thereto to Mr. George Thorpe, Sr. as owner of Oakland Farms. Mr. George Thorpe, Jr., as an employee of Ag-Suppliers, took no action to convey title to Mr. George Thorpe, Sr. The decision to convey title was made by Mr. George Thorpe, Sr. as President of Ag-Suppliers.[8] Thereafter, Mr. George Thorpe, Sr., in the capacity of owner of Oakland Farms directed his farm manager to pick up the product to which Mr. Thorpe then held title and to spray it on the peanut fields at Oakland Farms. Once title had been transferred, Ag-Suppliers had no authority over the product other than to hold it for pick up by its new owner.

The decisions which Complainant cites in support of its position are inapposite.[9] In those cases separate, bona fide sales actually took place between arms-length parties and title to the personalty may be deemed to have passed with each sale.

Therefore, I find that there was a single act of "distribution or sale" of the two dinoseb products and that act of "distribution

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[8]Tr. 114.

[9]In the Matter of Helena Chemical Company, Docket No. 09-0439-C-85-18, FIFRA Appeal No. 87-3 (November 16, 1989) and In the Matter of Selco Supply Company, Inc., IF&R Docket No. VIII-32C (September 8, 1978).

or sale" occurred when Mr. George Thorpe, Sr. made the decision to transfer title to the products to himself for use on his farms. Once the decision was made, title passed and the "distribution" was completed.

Consequently, Complainant's motion to amend the complaint to charge Respondent with six (6) separate violations of Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J) is denied. Complainant's motion to amend the complaint to withdraw two (2) counts alleging that Respondent violated Section 12(a)(2)(K) of FIFRA, 7 U.S.C. 136j(a)(2)(K), is granted. In summary, the Respondent is charged in two counts of having violated Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J).

The Complainant maintains that the Respondent violated the Emergency Suspension Order each time that it distributed a product with a separate EPA registration number. Respondent argues that all of the material, regardless of the name of the two mixtures, contained the one chemical, dinoseb, which had been determined to be hazardous, and all of it was transferred to Mr. Thorpe and applied to his crops. This could only be classified as one violation of EPA rules and should only constitute one count or one charge.

I must agree with Complainant that the distribution of each separately registered pesticide product containing dinoseb constitutes a violation of the Emergency Suspension Order. Respondent violated that Order twice because it transferred title to two separately registered pesticide products - "Ancrack" (EPA

Registration number 19713-23) and "Dynamyte 3" (EPA registration number 19713-82). Sales of separately registered pesticide products containing the same hazardous chemical are considered to constitute separate violations of FIFRA and to warrant separate penalties.[10]

Therefore, I conclude that:

(a) Respondent's transfer of the product "Ancrack" during May 1988 constitutes a distribution in violation of the Emergency Suspension Order and, hence, is an unlawful act under Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J), as alleged in Count I of the initial complaint.

(b) Respondent's transfer of the product "Dynamyte 3" during May 1988 constitutes a distribution in violation of the Emergency Suspension Order and, hence, is an unlawful act under Section 12(a)(2)(J) of FIFRA, 7 U.S.C. § 136j(a)(2)(J), as alleged in Count III of the initial complaint.

B. The Penalty

Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), states that "[i]n determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation." Section 14(a)(1), 7 U.S.C. § 136l(a)(1) limits the civil penalty

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[10] In the Matter of Selco Supply Company, Inc., IF&R Docket No. VIII-32C (Initial Decision, September 8, 1978), at 22-23.

for any "dealer, retailer or other distributor" to $5,000 for each offense.

Section 22.27(b) of the Consolidated Rules of Practice (40 C.F.R. § 22.27(b)) states, in pertinent part:

> If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease.

The Agency has published civil penalty guidelines in the 1990 ERP.[11] Respondent argues that the 1990 ERP should not be used to calculate the penalty in this matter. I must reject that argument. In agreement with the Complainant, I find that the July 2, 1990 ERP superseded the prior FIFRA penalty policy, thus rendering that policy void. Consequently, proposed penalties in all complaints issued by EPA after that date were required to be based upon the new ERP.[12] Since the complaint in this matter was issued on August 27, 1990, it is appropriate that I use the 1990 ERP to calculate the penalty in this matter. In any case, as EPA points

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[11] Supra at 12.

[12] 1990 FIFRA ERP at 1 (Compl. Exh. 9); ERP Notice of Availability, 55 Fed. Reg. 30032 (July 24, 1990).

out, the calculation of a penalty under the expired policy would produce the same result.

Computation of the penalty amount under the ERP is determined in a five stage process. These stages are: (1) determination of gravity or "level" of the violation; (2) determination of the size of business category for the violator; (3) use of civil penalty matrices to determine the dollar amount associated with the gravity level of violation and the size of business category of the violator; (4) further gravity adjustments of the base penalty in potential harm to human health and/or the environment, the compliance history of the violator, and the culpability of the violator; and (5) consideration of the effect that payment of the total civil penalty will have on the violator's ability to continue in business.

Utilizing these guidelines and the five stage process involved, EPA calculated the proposed penalty of $5,000 per violation. I turn now to the five stage process in the ERP to determine the appropriate penalty for each of the violations found.

(1) Gravity or Level of the violation: The violation of a suspension order issued under Section 6 of FIFRA is set at the highest of four possible levels for those listed in Section 14(a)(1) of the Act. In agreement with EPA, I find that the gravity of the violation is Level 1.

(2) Size of Respondent's business: The size of the business is determined from Respondent's gross revenues from all revenue sources during the prior calendar year. Since Respondent's

revenues exceeded $1 million during calendar year 1989, Category I is appropriate for this factor.

(3) Base Penalty Determination: Utilizing the Civil Penalty Matrix for FIFRA Section 14(a)(1), a Gravity Level I and a Category I Business Size produce a base penalty figure of $5,000.

(4) Gravity Adjustments: The ERP lists five gravity adjustment factors: (a) pesticide toxicity; (b) harm to human health; (c) environmental harm; (d) compliance history of the violator; and (e) culpability of the violator.

(a) The pesticide toxicity must be ranked at value 2. Dinoseb is classified as a Category I pesticide because it is associated with chronic health effects, such as mutagenicity, oncogenicity and teratogenicity.[13]

(b) The harm to human health must be classified as potential, serious or widespread harm. In his Emergency Suspension Order, the Administrator determined that the continued distribution of dinoseb would "pose an imminent hazard . . . based primarily on evidence that dinoseb exposure poses a risk of birth defects, male sterility, and acute toxicity to agricultural workers.[14]

Mr. Reginald Harris, a toxicologist who appeared as an expert witness concerning the toxic effects of dinoseb, testified that "the level at which harmful effects to human health are caused by dinoseb is very, very low." In other words, "very low doses are

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[13]See, Finding of Fact 3, supra at 5.

[14]51 Fed. Reg. at 36634.

required for dinoseb [to produce] . . . its deleterious effects."[15] A value of 3 is therefore assigned to this factor.

(c) The environmental harm of dinoseb was assigned the low value of 1 by EPA because "the products were used [by Respondent] . . . in the same manner that they had been labeled for use and . . . . The basis of the emergency suspension order was not . . . environmental concerns, . . . [but] human health concerns.[16] I concur in EPA's conclusion with respect to this gravity adjustment factor.

(d) Since Ag-Suppliers has had no prior FIFRA violations, the lowest possible value of "0" is appropriate for the compliance history factor.

(e) The last of the gravity adjustment factors relates to the culpability of the violator. Complainant contends that each violation of the Emergency Suspension Order in this matter was "knowing or willful" and therefore the highest value of "4" should be assigned to this factor.

Respondent, on the other hand, contends that "2" should be assigned to this factor because although Respondent "was fully aware of all issues . . . there are many mitigating factors in this particular case." Among the factors which Respondent cites are the following:

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[15]Tr. 34.

[16]Tr. 57.

- After the issuance of the VDACS Stop Sale, Use, Removal or Seizure Order, Ag-Suppliers tried for eighteen (18) months to get Drexel, the manufacturer, or Coastal, the distributor, to take the "Dynamyte 3" and the "Ancrack" back, but both refused to do so.

- Respondent kept the dinoseb products separate from all other products on hand and in a protected and dry place as instructed by EPA.

- As the containers gradually began to leak and disintegrate, Respondent attempted to repack some of the worst cans in an effort to comply with EPA's instructions even though the Respondent was not licensed to do repacking at that time.

- Respondent attempted to get additional information from EPA as to progress being made concerning disposal and indemnification plans for dinoseb products, but no relief from EPA was in sight.

- By the spring of 1988 Respondent was becoming desperate because the containers were continuing to deteriorate. Respondent feared that all of the containers ultimately might disintegrate totally and create an environmental disaster by leaking into the stream behind the warehouse and eventually into the Nottoway River, one of the main rivers in that area of the state.

Respondent's contentions reflect the frustrations of a retail dealer in a "grass roots" American rural town who is faced with an environmental problem not of his own making and who feels he is getting no real help from the distant bureaucracies of the manufacturer, the distributor and the government. Nevertheless, while these frustrations may help to explain Respondent's conduct,

they do not warrant reducing Respondent's culpability for its violations of the law. In agreement with the Complainant, I find those violations to have been knowing and willful.

Although Respondent's conduct in transferring and using the dinoseb products may be characterized as knowing and willful, it was knowing and willful in the sense that it was voluntary, designed, purposeful and intentional. Mr. George Thorpe, Sr.'s motive was not evil, malicious or even avaricious. He certainly was not acting out an intent to do harm to the environment or to human health. He did not sell the product to an unknowing or unsuspecting buyer. He received no material gain from its distribution. Mr. Thorpe was attempting to resolve an environmental problem, not of his creation, by doing with the products exactly what he had done with dinoseb products for thirty (30) years[17] - by applying it to his own peanut crop. Nevertheless, Respondent has admitted that at the time of the transfer it had knowledge of the Emergency Suspension Order prohibiting the sale, distribution or use of dinoseb products.[18] At the time of the transfer Respondent had received the Stop Sale, Use, Removal or Seizure Order from the VDACS.[19] To transfer title to these dinoseb products in the face of those prohibitions was clearly an intentional, knowing and willful act by Respondent.

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[17]Tr. 112.

[18]Finding of Fact 9, supra at 5.

[19]Finding of Fact 10, supra at 4; Tr. 114-15.

As Complainant has pointed out, Respondent did have an alternative course of action available to it. That alternative was to transfer the product from the leaking containers to "sound, suitable, larger container[s]" as directed in the EPA Notice on indemnification and disposal. Mr. George Thorpe, Sr. acknowledged this alternative in his testimony when he said: "Or either go in and buy a lot of containers and pour this material into these containers and continue to store them."[20] However, he dismissed that alternative for the reason that "we had no access to those kind of containers at that time."[21]

Since the violations were knowing and willful, I assign a value of 4 to this gravity adjustment factor.

The total points assigned to the gravity adjustment factors (10) fall into the 8 to 12 range which range calls for no change to the base penalty of $5,000.

(5) Ability to Continue in Business: Since Ag-Suppliers has not contended that it is financially unable to pay a penalty of $10,000 or that payment of such a penalty would affect its ability to continue in business, no adjustment is appropriate at this, the final stage of the penalty determination process.

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[20]Tr. 112.

[21]Id.

ORDER[22]

Pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, a civil penalty in the amount of $10,000 is assessed against Respondent, Ag-Suppliers, for the violations of Section 12 of FIFRA, 7 U.S.C. § 136j.

IT IS ORDERED that Respondent, Ag-Suppliers, Inc., pay a civil penalty to the United States in the sum of $10,000.00. Payment shall be made by cashier's or certified check payable to "Treasurer, United States of America." The check shall be sent to:

U.S. Environmental Protection Agency
P.O. Box 360515M
Pittsburgh, PA 15251

Respondent shall note on the check the docket number specified on the first page of this initial decision. At that time of payment, Respondent shall send a notice of such payment and a copy of the check to:

Regional Hearing Clerk
U.S. Environmental Protection Agency
Region III
841 Chestnut Building
Philadelphia, Pennsylvania 19107

Attn: Lydia A. Guy

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: December 2, 1991
Washington, DC

[22]Pursuant to 40 C.F.R. § 22.27(c), this initial decision shall become the final order of the Administrator within forty-five (45) days after the service upon the parties unless an appeal to the Administrator is taken by a party or the Administrator elects to review the initial decision upon his own motion. 40 C.F.R. § 22.30 sets forth the procedures for appeal from this initial decision.