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

OFFICE OF
THE ADMINISTRATOR

IN RE	)	
	)	IF&R NO. VIII-62C
NEIL HIRSCHHORN	)	
	)	
Respondent	)	

INITIAL DECISION

This is a proceeding under §14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended, 7 U.S.C. 136 1(a) (supp. v, 1975) for assessment of civil penalties for violation of 7 U.S.C. 136-136y (1972) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended. This proceeding was initiated by a Complaint issued on April 1, 1982 relating to the improper use of a pesticide called Temik 10G. The Respondent filed its Answer on April 15, 1982 and the matter was assigned to the undersigned Administrative Law Judge on May 5, 1982. The Answer filed on behalf of the Respondent by counsel admitted the violation and took issue only with the amount of the proposed penalty as set forth in the Complaint. At the Court's suggestion, the parties agreed to submit this matter to me on briefs solely on the question of the amount of civil penalty to be assessed. The Complainant proposed to assess a penalty of $1,250.00 for the violation alleged in the Complaint.

Discussion

The Respondent, Mr. Neil Hirschhorn, is the owner of Country Gardens Nursery located in Fort Collins, Colorado. Although it is not stated in the pleadings, one must assume that this enterprise operated by Mr. Hirschhorn provides the normal goods and services one associates with a nursery. On or about July 14, 1981, an authorized EPA inspector conducted an inspection of Country Gardens and found that Temik 10G (EPA Registration No. 264-322), a restricted use pesticide was being used at Country Gardens. At the time of this use at Country Gardens, neither Mr. Hirschhorn nor any of his agents or employees was a certified applicator of pesticides. The label of Temik 10G states that it is to be sold only to and used by certified applicators or persons under their direct supervision.

Section 12 of FIFRA, 7 U.S.C. §136j, states, in relevant part, that it is unlawful "to use any registered pesticide in a manner inconsistent with its labeling." The use of Temik 10G, a restricted use pesticide, by Respondent, its agent or employees constitutes a violation of §12(a)(2)(G) of FIFRA. Inasmuch as the Respondent alleged that payment of the proposed penalty would adversely effect its ability to continue in business, pursuant to the Court's instructions, the Respondent provided copies of its 1981 Federal Income Tax Return.

Pursuant to my instructions the parties provided briefs on the question of the appropriateness of the civil penalty to be assessed in this matter. The Complainant states that the penalty of $1,250 proposed in the Complaint was calculated in accordance with the policy and guidance set forth in "Civil Penalty Assessment Schedule" 39 F.R. 27711, 13. This schedule

takes into account the gravity of the violation and the size of the business of the person charged. The instant case involves a use violation, specifically the use of a pesticide in a mannner inconsistent with the labeling - noted as "E28" in the charge code column of the Schedule. Within this grouping, the violation under discussion falls into the "adverse effects highly probable" cell due to the extremely toxic nature of Temik 10G, the restricted use pesticide involved in this case. The next item to be addressed in determining a proper penalty to be assessed is the size of Respondent's business. The 1981 Income Tax Return filed by the Respondent on the business reveals that the gross sales for that year was $267,943.00. This sales figure places the Respondent in Category 2 of the Schedule; that Category being defined as a business having annual gross sales between $100,000 and $400,000 annually.

The Complainant then argues that the application of the above cited information to the Schedule results in a penalty base figure of $1,250 and when one considers the highly toxic nature of the chemical involved and the Respondent's knowledge of the requirements of the Act at the time of the violation that no reduction of this figure is warranted under the penalty guidelines. In his brief, Respondent agrees that the base figure of $1,250 was properly calculated in accordance with the Penalty Schedule but due to the particular facts of this case, the Respondent suggests that the proposed penalty is excessive and unduly burdensome. In support of this proposition, Respondent advises that although the product was used by persons not properly licensed the application was confined to the enclosed greenhouse area and out of the presence of any members of the public. With the exception of the

certification requirement, all other label directions were adhered to and application, equipment, cleaning and storage, and disposal of residue was conducted in accordance with the label directions. Upon being advised of the violation, Mr. Hirschhorn employed a certified applicator to apply this pesticide while Mr. Hirschhorn was completing the EPA sponsored instruction program for private applicators and was subsequently certified. Counsel also alleges that this is Mr. Hirschhorn's first violation under FIFRA, a fact not disputed by the Complainant.

The financial materials submitted by the Respondent indicated that although the gross sales were $267.943, the net profit from Country Gardens was only $11,967 and that the net disposal income of both Mr. and Mrs. Hirschhorn was only $9,761 for the calendar year 1981. Counsel argues that to impose the proposed penalty would clearly place an unreasonable burden on the Hirschhorn's already heavily committed cash flow and, in fact, consume some 13 per cent of their net disposal income.

Counsel then goes on to argue that inasmuch as the business has only been recently acquired by the Hirschhorns they relied heavily on financing to acquire the business and still must resort, from time to time, to interim financing to meet seasonable cash flow fluctuations. The assessment of the proposed penalty would place a severe burden on the Hirschhorns' ability to meet these debt service obligations as well as their ongoing business and ordinary personal expenses. Counsel concludes that this circumstance could be said to jeopardize their ability to continue the

business. He concludes by drawing the Court's attention to the current economic circumstances of the Nation which have affected retail sales in the Fort Collins' area dramatically and will surely be reflected in the Hirschhorn's gross sales for 1982.

Conclusion

In determining the amount of the penalty which should appropriately be assessed, §14(a)(3) of the Act requires that there shall be considered the appropriateness of the penalty to the size of the Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation. The Regulations further provide that in evaluating the gravity of the violation there should also be considered the Respondent's history of compliance with the Act and any evidence of good faith. The parties have stipulated that the $1,250 penalty was properly assessed in terms of the size of the business.

In previously decided civil penalty cases under FIFRA it has been held that the gravity of the violation should be considered from two aspects--gravity of harm and gravity of misconduct. As to the gravity of misconduct, I conclude that the violation was not of a high order but is nevertheless an admitted violation of the Act done so with the knowledge of what the law requires.

As to the gravity of harm, although actual injury to the environment or to the health of persons has not been alleged, certainly in view of the hazardous nature of the product the potential for harm is extremely high. Unfortunately, the Complainant did not provide to the Court a copy of the label for this product nor did he describe the specific hazards

associated with the use of the product by someone other than a certified applicator. In view of this lack of information and the argument provided by Respondent that Mr. Hirschhorn and his employees applied the pesticide in strict conformity to the instructions for use given on the label and that no member of the general public was at any time exposed to this pesticide during its application, I must conclude that the gravity of harm or potential for actual injury was rather low.

Under the circumstances of this case taking into consideration all of the factors required by law and regulations to be considered, I am of the opinion that the $1,250 penalty proposed by the Complainant is high. In coming to this conclusion, I have also taken into consideration the past history of the Respondent in complying with the Act and with its prompt curing of the violation set forth in the Complaint by hiring a certified applicator and later receiving the necessary training and being certified himself. I have considered the entire record in this case consisting of the admitted facts by the parties, the arguments presented by them in their briefs and any suggestions, requests or arguments inconsistent with this Decision are denied. It is proposed that the following Order be issued.

FINAL ORDER

Pursuant to §14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $750.00 is assessed against Respondent, Neil Hirschhorn, for the violation which has been established on the basis of the Complaint issued on April 1, 1982.

Thomas B. Yost
Administrative Law Judge

DATED: November 23, 1982

Unless appeal is taken by the filing of exceptions pursuant to §22.30 of the Consolidated Rules of Practice, or the Administrator elects to review this Decision onlhis own motion, the Initial Decision shall become the Final Order of the Agency. (See §22.27(c)).

JUDGE THOMAS B. YOST
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