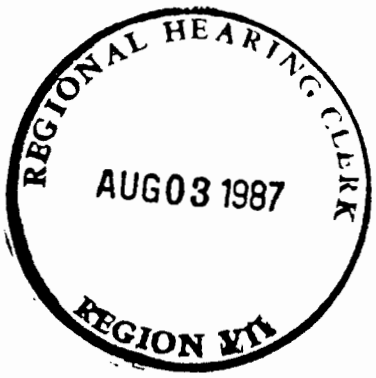
UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR



IN THE MATTER OF:	
CO-OPERATIVE GRAIN & SUPPLY COMPANY,	FIFRA Docket Number VII-719C-86P
CO-OPERATIVE GRAIN & SUPPLY COMPANY	FIFRA Docket Number VII-739C-86P
AND	
DAVID WADEMAN,	FIFRA Docket Number VII-740C-86P
RESPONDENTS	CONSOLIDATED

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

1. Respondent's failure to report in writing to the Environmental Protection Agency ("EPA" or "the Agency") the fact of its becoming a restricted-use pesticide ("RUP") dealer violated 40 CFR 171.11(g)(1) and the assessment of a civil penalty for such failure is appropriate.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

2. Regulations duly promulgated pursuant to delegation of authority from Congress have the force and effect of law and ignorance of the law is no excuse for violation of such regulations.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

3. Intent is not an element of a violation under the statute providing for the assessment of civil penalties and when reporting and recordkeeping regulations are violated, a civil penalty shall be assessed without respect to Respondent's intent to do so.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

4. Under 40 CFR 22.19(b), documents that are not exchanged pursuant to prehearing order are not entitled to be received as evidence. Where such documents are received, subject to objection, and the record leaves to speculation whether such documents existed at or on pertinent dates, little weight, if any, will be accorded such documents.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

5. Compliance with the recordkeeping requirements of 40 CFR 171.11(g)(2) requires complete recordation of all essential facts provided for in said regulation and its subparts.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

6. Failure of RUP dealer to report to EPA in writing the fact of its becoming a RUP dealer, which report is required to identify each and all of its facilities where RUPs are made available, is not substantially distinguishable from prior and subsequent failures to so report, and a single civil penalty should be assessed for all such failures.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

7. A violation resulting from Respondent's failure to keep records is substantially distinguishable from a like charge where facts to be proved in the one charge differ from facts to be proved in the other.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

8. A pesticide, classified by the Administrator of the EPA for restricted use, on determination that said pesticide presents a hazard to the applicator or other persons, must, under Section 3(d) of FIFRA, be applied only by or under the direct supervision of an applicator certified pursuant to Section 4 of the Act.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

9. Where a certified applicator was retained by Respondent but furnished no direct supervision and maintained no control with respect to admitted applications of RUPs by said Respondent, said applications were made in violation of the Act.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

10. Where applications of pesticides are made by non-certified applicators, such applications must be made "under the direct supervision of a certified applicator", as said quoted phrase is defined by Section 2(e)(4) of the Act, and pursuant to the standards set forth in pertinent regulations including, specifically, 40 CFR 171.6.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

11. A remedial statute is liberally construed to further its life in advancing the remedy and striking down the mischief aimed at by the applicable Congressional enactment and regulations promulgated pursuant hereto. Where a regulatory purpose is pronounced, a statute should be read in a manner which effectuates, rather than frustrates, such purpose.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

12. A statement by an employee, possessing limited knowledge and authority, is entitled to little weight, when said statement purports to determine a crucial issue in the case, and is directly refuted by Respondent's personnel possessing superior knowledge and authority.

FEDERAL INSECTICIDE FUNGICIDE AND RODENTICIDE ACT ("FIFRA")

13. Civil penalties are properly assessed upon consideration of the provisions of the Act (Section 14(a)(4)), the regulations (40 CFR 22.27(b) and 22.35(c)) and the Guidelines for the Assessment of Civil Penalties, and any amendments or supplements thereto; however, penalties in an amount different from that so provided may be assessed by the Administrative Law Judge where the record reflects specific reasons for such assessment.

APPEARANCES

For Complainant:

Rupert G. Thomas, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent:

Jerome Heuertz, General Manager
Co-Operative Grain and Supply Company
Roseland, Nebraska 68973

INITIAL DECISION

Marvin E. Jones
Administrative Law Judge

A hearing was held in Hastings, Nebraska, on Thursday, May 14, 1987, wherein evidence was taken concerning the three above-styled Complaints, alleging violations of FIFRA. The two Complaints, first above-styled, named Co-Operative Grain and Supply Company (Co-Op) as Respondent. The third Complaint named David Wademan, an employee of Co-Op, as Respondent. IF&R Docket No. VII-719C-86P alleges that:

Count I: On May 31, 1984, said Respondent, Co-Op, a restricted-use pesticide (RUP) dealer, made available for use, through sale, five gallons of Paraquat, a RUP, to Keith Classen, which customer was then certified to use RUPs in Nebraska. Respondent, though required, pursuant to 40 CFR 171.11(g)(1), to report to the United States Environmental Protection Agency (hereinafter "EPA" or "the Agency") within 60 days after it became a RUP dealer (40 CFR 171.2(b)(3)), failed to submit such report; by its failure to so report, Respondent violated Section 12(a)(2)(N) of FIFRA; and a civil penalty of $2970 should be assessed against Respondent pursuant to Section 14 of FIFRA.

Count II: On April 16, 1985, Respondent, at its Roseland, Nebraska, facility, made available for use, through sale to Ivan Joynt, 25 gallons of Dyfonate, a RUP; Respondent violated the requirements of 40 CFR 171.11(g)(2)(i) in that it did not maintain a record of such sale containing the address and principal place of business of said Ivan Joynt, along with said customer's certification number, the state of issuance and expiration date of any such certificate and the EPA registration number of the Dyfonate then sold; for Respondent's failure to maintain records on the sale of RUPs, it is proposed that a civil

penalty of $4620 be assessed. On said first-styled Complaint, it is proposed that civil penalties in the total sum of $7590 be assessed against Respondent.

The second-styled Complaint, IF&R Docket No. VII-739C-86P, alleges that:

Count I: On July 18, 1985, Respondent's facility in Blue Hill, Nebraska, made available for use, through sale, one container of Degesch Phostoxin, a RUP, to Howard Jesske; Respondent, though required, pursuant to 40 CFR 171.11(g)(1), to report to EPA within 60 days after it became a "RUP dealer" (as that term is defined at 40 CFR 171.2(b)(3)), failed to submit such report; by its failure to so report, Respondent violated Section 12(a)(2)(N) of FIFRA, and a civil penalty of $2700 should be assessed against Respondent, pursuant to Section 14 of FIFRA.

Count II: Said Howard Jesske was certified to use RUPs in Nebraska; Respondent violated 40 CFR 171.11(g)(2) which requires that each RUP retail dealer maintain a record of each transaction where a RUP is made available for use to a certified applicator; that such record should contain (1) the name of the said certified applicator, along with his residence or business address; (2) said customer's certification number, along with the state of issuance and the expiration date of, and the categories of certification on, said certificate; (3) the product name and EPA registration number; (4) the quantity of pesticide then made available for use, and (5) the date of the transaction; by its said failure to maintain such record, Respondent violated 40 CFR 171.11(g)(2); pursuant to Section 14 of FIFRA, a civil penalty in the sum of $4200 should be assessed against Respondent.

Count III: On at least two occasions between 1984 and 1986, Respondent,

at its Blue Hill, Nebraska, facility, made available for use to its employees, David Wademan and Wilber Wells (neither of whom were certified to use RUPs in Nebraska) Degesch Phostoxin, a RUP; that Respondent thereby violated Section 12(a)(2)(F) for making said RUP available for use for any purpose other than in accordance with Section 3(d) of FIFRA which specifically provides that a RUP shall be applied only by or under the direct supervision of a certified applicator, and pursuant to Section 14 of FIFRA, it is proposed that a penalty of $5000 be assessed against Respondent for such violation.

Count IV: Respondent, at its Blue Hill, Nebraska, facility, held for sale two one-pint containers of Acme Sure Noxem Garden Spray; said product is a pesticide with a label bearing pesticidal claims and containing 5.0% dichloro diphenyl trichloroethane (DDT); said product is not registered under Section 3 of FIFRA; it is a violation of Section 12(a)(1)(A) of FIFRA for any person to hold for sale any pesticide which is not registered under said Section 3; it is proposed that a civil penalty in the sum of $2200 be assessed against Respondent, pursuant to Section 14 of FIFRA. On said second-styled Complaint, it is proposed that civil penalties in the total sum of $14,100 should be assessed against Respondent for said violations alleged.

The third-styled Complaint, In the Matter of David Wademan, IF&R Docket No. VII-740C-86P, alleges that:

Count I: On at least two occasions between 1984 and 1986, Respondent David Wademan, while acting within the course of his employment with Co-Operative Grain & Supply Company, Blue Hill, Nebraska, applied Degesch Phostoxin, a RUP, to grain at the Blue Hill, Nebraska, facility of said

Co-Operative Grain & Supply Company; Respondent Wademan was not then certified to use RUPs nor did he apply said RUP under the direct supervision of a certified applicator, as specified by Section 3(d)(1)(C) of the Act and said RUP label; it is a violation of Section 12(a)(2)(F) of FIFRA for any person to use any RUP other than in accordance with Section 3(d) of FIFRA; pursuant to Section 14 of FIFRA, a penalty of $500 should be assessed against Respondent David Wademan.

Count II: Respondent Wademan's use and application of Degesch Phostoxin, as alleged hereinabove, was inconsistent with label directions, in that he was not then a certified applicator, was in violation of Section 12(a)(2)(G) of FIFRA. On said third-styled Complaint, it is proposed that a civil penalty in the total sum of $500 be assessed against the Respondent David Wademan.

At said hearing, with respect to Docket No. IF&R VII-719C-86P, Count I, the Respondent admitted the following allegations:

1. The sale of Paraquat to Keith Classen on May 31, 1984 (Complaint, paragraph 6);

2. That Classen was certified to use RUP in Nebraska (Complaint, paragraph 7);

3. That EPA's sample obtained March 27, 1985, related to said sale (Complaint, paragraph 8);

4. Respondent is a RUP dealer as that term is defined in 40 CFR 171.2(b)3 (Complaint, paragraphs 9 and 10), and

5. That Respondent, as a RUP dealer in Nebraska, was, and is, required by 40 CFR 171.11(g)(1) 1/ to report to EPA no later than 60 days after it first became a RUP dealer.

Respondent's purported defense to said charge is that it was unaware of the said regulation.

It should suffice to state that the subject regulations, duly promulgated, pursuant to delegation of authority from Congress (7 USC, Section 136b and 136w), have the force and effect of law and that ignorance of the law is no excuse. Said regulations are the supreme law of the land, just as a federal statute (Davis Administrative Law Treatise, Vol. 1, Section 6.10). Having been filed and published (39 FR 36449, Oct. 9, 1974), it is binding on and gives notice to the public (and each of the parties) until repealed or modified by court order (Sheridan, Wyoming Coal Co. v. King, 172 Fed 2d 282 (1949)). As was stated in U.S. Parfait Powder Puff Co., Inc., 163 Fed 2d 1008, l.c. 1009(2), 1947, the legislation (and regulations promulgated pursuant thereto) was enacted, in aid of maintenance of public policy, to punish particular acts (or omissions) and "he who shall do them shall do them at his peril and shall not be heard to plead in defense good faith or ignorance." Further, it will be noted that Section 14(a) of the statute (7 USC 1361(a)) does not provide for "intent to violate" as does Section 14(b) - Criminal Penalties - where a finding that a Respondent "knowingly

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1/ The regulation provides:

> (1) Reporting requirements. Each . . . restricted use pesticide (RUP) dealer . . . shall:
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> (i) Report to the (EPA) the business name by which (said dealer) operates, and the name and business address of each of his dealerships. [Dealers in Nebraska are required to report to EPA, Region VII.] This report shall be submitted . . . no later than 60 days after the date the person first becomes a RUP retail dealer . . .

violates" is required for the assessment of a criminal penalty. Under Section 14(a) - Civil Penalties - the word "knowingly" does not appear; therefore, intent is not an element of the violation but a civil penalty is to be assessed if any provision of the law is violated, without respect to Respondent's intent to do so. However, we have consistently held that intent or lack of intent will be considered in determining the gravity of the offense.

Mary Jane Wingett, an Environmental Protection Specialist with U.S. EPA, Region VII, testified (Transcript [hereinafter "T"] 56) that she determined the penalties to be assessed herein, using guidelines for the assessment of civil penalties published in the Federal Register on July 31, 1974. Up to May 13, 1987, the day before the instant hearing, Respondent had not reported to EPA that it is a RUP dealer. Ms. Wingett stated (T60) that the regulation requiring Respondent to so report was published in the Federal Register in 1983; although EPA is not required to mail notices to dealers advising them they are required to report, such notification was mailed in May, 1984, and Respondent was one of the firms to whom such notification was then mailed. Also, in March, 1985, after an inspection of one of Respondent's facilities, on finding there had been no report filed by it as a RUP retail dealer, Respondent again was notified of such requirement, and EPA also sent it a copy of the regulations. It is clear from the above that Respondent had both constructive and actual notice of the requirement that it report to EPA that it was a RUP retail dealer. Such report must be submitted to the EPA Region VII office in Kansas City (40 CFR 171.11(g)(1)(i)). That it must be submitted in writing is apparent from the provision of Section 171.11(g)(1)(ii), which provides for revisions to

the original report when and where appropriate. Respondent claims to have called EPA on August 6, 1985, from its Blue Hill, Nebraska, facility (see Respondent [hereinafter "R"] Exhibit [hereinafter "EX"] No. 2), and contends that it then mentioned it was a RUP retail dealer. There is no evidence who Respondent's manager talked to or what was discussed.

Respondent's contention on this issue lends emphasis to the importance of strict compliance with the regulations. It is apparent that Respondent was a retail dealer at its several locations, much longer than 60 days after it received actual notice of the requirement that it notify EPA, Region VII, of that fact, and over two years after the regulation was published in the Federal Register in 1983.

Respondent's manager further claims he visited EPA in the spring of 1985 and he then became aware of the notification requirement and was told "a phone call was sufficient." Again, one must speculate as to what was discussed in the instance referred to and with whom. Such evidence falls far short of being substantial. For said failure, a civil penalty of $2970, the amount proposed in the Complaint, should and will be assessed against Respondent.

Count II: With respect to Count II of said IF&R Docket No. VII-719-86P, Respondent admits that:

1. On April 16, 1985, it sold 25 gallons of Dyfonate, a RUP, to Ivan Joynt, a certified applicator (Complaint, paragraph 16);

2. EPA's sample, obtained February 11, 1986, related to said sale (Complaint, paragraph 17), and

3. That Respondent, as a RUP retail dealer, was and is required by 40 CFR 171.11(g)(2)(i) 2/ to maintain records of each transaction where a RUP is made available for use to a certified applicator (Complaint, paragraph 18).

Respondent contended at the hearing and in its post-hearing submission that Respondent's Exhibit No. 1, first presented at the hearing, evidenced that it "kept records." Complainant objected to said Exhibit 1 (T114) being admitted into evidence on the grounds that it was not submitted to the EPA inspector, nor was it submitted as a part of the prehearing exchange prepared and filed pursuant to the directions contained in my designation letter in conformity with the provisions of 40 CFR 22.19(b). Said provisions require that documents that have not been exchanged not be received in evidence. Said exhibit was, however, received subject to the objection made by Complainant. For the reason that said document was not shown to the EPA inspector and was not revealed at the time of the prehearing exchange, no weight is here accorded the document on the issue of whether any records were in fact kept and in existence at the time of subject EPA inspection. The exhibit is one page of ruled notebook paper purporting to list, in ink, the names and certificate numbers of patrons along with gallons purchased and invoice number. Attached thereto

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2/ Section 171.11(g)(2)(i) provides that recordkeeping is required when making RUPs available to Certified Applicators. "Each RUP retail dealer shall maintain, at each individual dealership, records of each transaction where a RUP is made available for use by that dealership to a certified applicator." Such record, which shall be maintained for 24 months, is required to include the name and address of certified applicator; applicator's certification number with its expiration date along with the categories in which he is certified; the product name along with EPA registration number; quantity of product made available for use in the transaction, and the date of the transaction.

is a page from a 4 1/4" x 5 1/2" "scratch pad" (bearing the advertisement of Harmack, Inc., Ag Chemicals) which purports to list, in ink, the names and NE certificate number of nine patrons, ostensibly certified applicators. The ruled notebook page has spaces under the words "Dyfonate", "Furadan" and "Paraquat" for only the information above referred to. Under "Dyfonate", the name, certificate number, number of gallons and invoice number are listed for Ivan Joynt. Under "Paraquat", the same information appears after the names of Keith Classen and Dave Parr. On its face, said "record" is incomplete, and thus does not comply with the applicable regulation, as it does not list the address of the certified applicator, the expiration date of his certificate nor the date of the transaction. On this record, I conclude that, as Respondent's Exhibit 1 was not timely produced as required by the regulations, Respondent has not borne its burden of going forward with a valid defense to the said Complaint nor shown grounds for mitigation of the penalty proposed in said Complaint. To find said record existed at the time of said purchase would require my indulgence in sheer speculation. I further find that said regulations require and thus contemplate that Respondent, and RUP retail dealers in general, keep records that are of a permanent nature, capable of being maintained for no less than 24 months, and which are complete in that they record all of the essential facts required by 40 CFR 171.11(g)(2)(i), subsections (A) through (E). The purported records are deficient in this respect even if Respondent's contention could be found credible.

For the reasons stated in the discussion, supra, I reject Respondent's contention that it was "unaware" of the rquirement that it "keep records" as provided in 40 CFR 171.11(g)(2). I find that a civil penalty in the sum of $4620, as proposed in the Complaint, should be assessed against Respondent.

In IF&R Docket No. VII-739C-86P (hereinafter "Case 739"), Respondent admits the following allegations of Count I:

1. That, on July 18, 1985, it sold one container of Degesch Phostoxin, a RUP, to Howard Jesske (Complaint, Paragraph 6);

2. That, on February 11, 1986, an EPA representative conducted an inspection of Respondent's facility in Blue Hill, Nebraska, and obtained from Respondent documents related to said sale to Jesske (Complaint, Paragraph 7).

3. That Respondent (by said sale) became a RUP retail dealer (Complaint, Paragraph 11).

Respondent further admits the provisions of 40 CFR 171.11(g), requiring Respondent, an RUP dealer, to report to EPA the name and address of each of its RUP dealerships no later than 60 days after it becomes a RUP dealer, but contends it was unaware of said regulation. Respondent further contends that it made a telephone call to EPA on August 6, 1985 (R EX 2). For the reasons set forth in my discussion on the similar issue concerning its facility in Roseland, Nebraska, Docket No. IF&R VII-719C-86P supra, page 11, the fact that a call was made without information concerning the party contacted at EPA, Region VII, or evidence of what was then discussed is too speculative to be considered substantive evidence on said issue.

Respondent further contends that the charge of failing to report as a RUP retail dealer is a duplication of the charge made by Count I of Case 719. I agree.

Witness Wingett, referring to Respondent's failure to comply with 40 CFR 171.11(g)(1)(a), stated (T59):

> "The dealer regulations state that the dealer must report on a one-time basis to Region 7 . . . if you're in Nebraska. You just send us a letter giving us the name and business address of each facility from which you make available for use RUPs."

I find that Respondent's failure to comply, while continuing, is the same failure for which a penalty has been assessed in Count I of Case 719. At the time of hearing, Respondent's failure to so report continued (T60). Respondent's manager expressed his intent to now comply with said regulation (T63) by submitting to EPA, Region VII, in writing, such required information.

I find that an additional civil penalty should not be assessed on said Count I, Case 739.

Respondent admits, with reference to Count II of Case 739, that 40 CFR 171.11(g)(2)(i) required Respondent, as a RUP retail dealer, to maintain records of its sale on July 18, 1985, of Degesch Phostoxin to Howard Jesske, certified in Nebraska to use RUPs; however, Respondent contends that it was, on said date, unaware of the said regulatory requirement. As discussed, supra, page 10, I find that Respondent had actual as well as constructive notice of such regulation. Its failure to maintain records in the manner and to the extent required by regulation makes it subject to a civil penalty as proposed in the Complaint. Further, I find that no weight should be accorded Respondent's purported record for the reasons stated, supra, page 11. I find that a civil penalty in the sum of $4200, as proposed, is appropriate and such amount should and will be herein assessed against Respondent, Co-Operative Grain and Supply Co., on account of said violation.

I further find that such charge that said Respondent failed to keep records is an independently assessable charge - it is a violation resulting from a failure substantially distinguishable from a like charge considered as Count II of Case 719 for the reason that:

1. In the first-styled Complaint (Case 719), Respondent failed to maintain records of the sale of RUPs (Dyfonate) to Ivan Joynt at its Roseland, Nebraska, facility on April 16, 1985, whereas in the second-styled Complaint (Case 739) the sale of RUPs (Phostoxin) was made to Howard Jesske at Respondent's Blue Hill, Nebraska, facility on July 18, 1985;

2. 40 CFR 171.11(g)(2)(i), the regulation requiring said recordkeeping when RUPs are made available to certified applicators, provides th[illegible] retail dealer shall maintain such records at each individual dealership (for) each transaction (see page 12, FN 2/, supra);

3. The violations are clearly distinguishable because the particular RUP sold and the customer to be identified, as well as the place and date of each sale, are different and, thus, are facts required to be proved in one charge and not in the other (see Holmquist Grain & Lumber Co., FIFRA Appeal No. 83-3 (4-25-85), citing Blockburger v. U.S., 284 US 299, 76 L Ed. 306, 52 S.Ct. 180 (1932)).

With reference to Count III of Case 739, Respondent admits that:

1. On at least two occasions between 1984 and 1986, it made available at its Blue Hill, Nebraska, facility a RUP pesticide for use by its employees, David Wademan and Wilber Wells, to be applied to grain stored on Respondent's premises;

2. Said Wademan and Wells were not certified to use RUPs in Nebraska;

3. Information, including a photocopy of the Degesch Phostoxin label, obtained by an EPA inspector on February 11, 1986, concerned the application of said RUP by said employees, and

4. Section 3(d) of the Act, 7 USC Section 136a(d)(1)(C)(i), provides and the said label bore the statement "Restricted Use Pesticide - For retail sale to and use only by Certified Applicator or persons under their direct supervision and only for those uses covered by the applicator's certification."

Respondent again contended it was unaware of the regulation, which contention is rejected for the reason that Respondent, on this record, had actual as well as constructive notice of said regulation, as discussed, supra, page 10.

Respondent also contends that it complied with said regulation because it maintained "on call" a certified applicator and that, therefore, said application by Wademan and Wells was "under the direct supervision of a certified applicator."

Respondent's position is indicated by the following testimony, beginning on page 90 of the Transcript:

Q: (by Mr. Heuertz, Respondent's General Manager): Mr. Wademan, is it not true that you have been instructed as to how to use the product properly?

A: Yeah, you've got to go by what, you know, they got on the label how to apply it.

(Continuing T91)

Q: (Heuertz): Is it your impression that if you had a question that you felt not comfortable with using the product that you could go to Mr. Moore to get your answers clarified?

A: He was probably up at Roseland.

Q: (Judge Jones): . . . if something had come up to where you needed to call somebody, you would have called Roseland and tried to get in touch with him, is that it?

A: Yes.

Q: But he wasn't there where you were putting this stuff on?

A: No.

(Transcript 92):

Q: (Heuertz): Did you talk to Mr. Moore each time the product was being used based on what you knew about and was schooled on the product?

(Transcript 93):

A: I didn't think we had to because, as far as the product, you know, it's the same product. And as long as you've been schooled on it, I figured you knew enough about it and with [Moore], we've still got to tell him, you know, register with him.

Q: Mr. Wademan, did you feel comfortable using the product and knowledgeable enough to use the product?

A: Yes.

A contention identical to the one here made by Respondent was considered and rejected in Singleton Spray Service Co., et al., IF&R 9-328C (8-17-84); AFFIRMED on Appeal No. 84-1 (5-19-86). In that case we stated, l.c. 18:

> " . . . the inquiry here is confined to the determination of whether the said 400 applications by Respondents of restricted-use pesticides, in 1981, were made by a certified applicator or by competent persons 'acting under the instructions, supervision and control of a certified applicator.' It is admitted by Respondents that the applications were made and that the persons so applying the restricted-use pesticides were not certified applicators. The record further establishes that Mike Finger, a certified applicator, did not, in 1981, 'instruct' or 'control' the persons making said applications. The determination here to be made is not whether Respondent . . . and his employee . . . are as knowledgeable or more knowledgeable than Mike Finger. That is a matter which, under the statute and regulations, must be determined by the certifying authority. Thus, the opinion [of the employee] or the apparent belief [of Respondent] that they were . . . better qualified than Finger only substantiates the proven fact that the services of Finger, a certified applicator, to instruct and control those persons who then made subject pesticide applications, were not utilized. On this record, the retention of Finger in 1981, in a consulting capacity, was but an effort to circumvent statutory and regulatory requirements.
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> "It must be understood that Congress makes the law and that its purpose in passing the legislation here pertinent is to protect the public health and the environment. The administration of the law and the promulgation of regulations pursuant to the law are powers delegated to the Administrator of the U.S. EPA, and to him alone. Both the law and the regulations recognize the hazards inherent in the application of pesticides classsified for restricted use. To facilitate the use of said pesticide, with minimum risk to the public, the statutes provide that only certain persons - certified as being knowledgeable and competent - may use or supervise the use of them . . . "

On this record, I find Respondent, Co-Operative Grain and Supply Company, clearly violated Section 12(a)(2)(F) of the Act, 7 USC 136j(a)(2)(F), as alleged in Count III, Case 739, said second-styled Complaint. I further find that a civil penalty in the sum of $5000, as proposed, should be assessed against said Respondent because of said violation.

With reference to Count IV of Case 739, Respondent admits that:

1. On the date alleged, a representative of EPA obtained from Respondent a sample of Acme Sure Noxem Garden Spray, a pesticide, which was packaged and labeled with the indication thereon that it contained DDT, along with the pesticidal claims that said product can be used "To control aphids, mites . . . (and other pests)."

2. Said Acme Sure Noxem Garden Spray is not registered under Section 3 of FIFRA, because its registration was cancelled, along with other products containing DDT, on January 15, 1971.

Respondent denies the violation charged - that it held for sale two one-pint containers of the product so sampled by the EPA representative (or inspector) on March 11, 1985. Respondent's General Manager (Heuertz) repudiated the written statement of one David Wademan, a grain elevator assistant, who ostensibly was in charge of Respondent's Blue Hill facility when its manager, Darrell Karr, was "out of town." Wademan told the inspector, to whom said statement was given, that said product for "for sale." The salient issue presented is whether said product was "held for sale" and our inquiry must of necessity determine if David Wademan, an employee in Respondent's elevator, was authorized to so determine.

One of the one-pint containers was on the bottom shelf in the "main purchase area" and the other was in another section of the Blue Hill facility referred to as the storage area. The inspector stated that other items (offered for sale) were in the said main purchase area.

Heuertz, Respondent's General Manager, emphatically denied that either of the one-pint containers was held for sale, pointing out that the container in the main purchase area was on the back of the bottom shelf, dusty and "old" (ostensibly meaning shelf-worn) and that no pricing appeared on the item.

Further, the product had not been on Respondent's inventory for several years.

The inspector did not recall about the "price tag," and indicated, in response to cross examination (T48), that since they were "able to find it" he didn't believe it was on the back part of said bottom shelf, i.e., "you could locate it by bending your back a little bit" (T52), and that he relied on Wademan's response that the product was "for sale." Said finding was not reviewed with the facility's manager who was "away for the day," nor did the inspector check to see if said product was included on Respondent's inventory or retail price list.

Respondent further contended (T45, 107) he was not notified that said product's registration had been cancelled as they did not receive a notice of the Stop Sale Use or Removal Order (SSURO).

Said Notice of the SSURO (C EX 2) is dated March 7, 1985 (prior to subject inspection), and signed by EPA official William A. Spratlin. Mr. Jackson (T40), EPA Inspector, stated he "put a SSURO on the Acme Sure Noxem Garden Spray" following the inspection. The record does not indicate if the Order, of which notice was given, complied with 7 USC 136q(c) as to disposal.

On the basis of the foregoing, I find upon consideration of all of the evidence elicited on the issue of whether said product was "held for sale", that David Wademan was not in such position of authority to make that determination. The further evidence is persuasive that it was the prerogative of management, and theirs alone, to determine whether the product would be sold, and only they could make that decision, and management's decision that the product was not for sale is indicated by the fact that the two one-pint containers were not at the same location - one was in the sales area, one in the warehouse; the product was dusty and shelf-worn, and had been

withheld from the inventory list for six years and the price was not available. The record further shows that inquiry of Darrell Parr, the store manager, or Mr. Heuertz, General Manager of Respondent, would have refuted the statement of Wademan (T84) that the product was "for sale".

In the matter of Briggs & Stratton Corporation, TSCA-V-C-001, -002, -003, TSCA Appeal 81-1 (1981), l.c. 9 through 11, the EPA Judicial Officer held that where a statement of a technician rather than that of an engineer was relied upon to determine a salient issue, i.e., whether capacitors were "designated for disposal", the testimony of one in a position of authority to make that determination, an Executive Vice President, that such capacitors were not designated for disposal was sufficient to discredit the statement of the technician on such crucial issue. It is clear in the instant case that, had the inspector sought substantiation of Wademan's statement that said Acme Sure Noxem was "for sale", such statement would have been refuted by those possessing authority to make such determination.

It is significant that Respondent's General Manager (T107) remarked:

> " . . . I, as general manager, have never been aware as to how we are supposed to dispose of these products. We have products on hand that have been off-sale for three or four years . . . "

Section 19(c), 7 USC 136q(c) provides that:

> (c) Notification of cancellation of any pesticide shall include specific provisions for the disposal of the unused quantities of such pesticide.

Whereas 40 CFR Part 165 apparently addresses the Agency and dealer obligations, it would appear that if alternatives there outlined were discussed with dealers in instances like the present case, proper disposal could be achieved.

In the premises, I find that such product was not "held for sale" and that no penalty should be assessed against Respondent on said charge.

In IF&R Docket No. VII-740C-86P, David Wademan is charged with two violations, to wit:

1. On at least two occasions between 1984 and 1986, while acting within the scope of his employment with Co-Operative Grain & Supply Co. in Blue Hill, Nebraska, he applied Degesch Phostoxin, a RUP, to grain in violation of Section 3(d)(1)(C)(i) of FIFRA, 7 USC 136a(d)(1)(C)(i), for the reason that said David Wademan was not then a certified applicator and said application was not then made while he was under the direct supervision of a certified applicator.

2. Said applications, described above, were in violation of Section 12(a)(2)(G) of FIFRA, 7 USC 136j(a)(2)(G), for the reason that the subject use of said pesticide was in a manner inconsistent with its labeling.

David Wademan is an employee (Grain Elevator Assistant [T46]) in the "Ag Department" at Co-Operative Grain & Supply Co's ("Co-Op") Blue Hill, Nebraska, facility, which job entails dumping trucks, loading chemicals and the like (T87-88). His background on chemicals and certified applicator requirements is admittedly "very limited" (T88). He was advised by his manager and believed that as long as he had been instructed on its use and followed its label instructions, that his application of said product was proper. As suggested by his employer's questions (T92-93), Randy Moore, a certified applicator whom Co-Op referred to as their "certified applicator", supervised the supplying of the product along with information concerning its use, and that if Wademan "felt not comfortable with using the product (he) could go to (Randy) Moore to get (answers)" (T91), " . . . that unless there was an unusual situation arose, (he) had no need to talk to Moore" (T92).

That such advice to Wademan by Co-Op's management is untenable is demonstrated in the discussion concerning Count III of Case 739, beginning on page 16, supra.

We are thus presented with an admitted violation by Wademan, but under facts where the responsibility for his action lies with his employer, particularly when considering his very limited knowledge and experience (T88). We have stated that intent is not an element of the violation charged (page 10, supra), but that lack of intent will be considered in determining the gravity of the offense. In fixing a penalty, discussed infra, we must consider the gravity of the offense and, as well, the situation of the violator so as to assess a penalty that will achieve compliance by all persons subject to the regulations in question (Section 14[a][4] of the Act; 40 CFR 22.27[b]).

Further, 40 CFR 22.35(b) provides that, in addition to considering the Guidelines for Assessment of Civil Penalties, we shall consider any evidence of good faith or lack thereof. On this record, Wademan's application of the subject RUP was a direct result of his employer's insistence that such assigned duties were in accordance with, and not violative of, the Act and pertinent regulations nor of the label directions on the RUP.

In the premises, I find that it is appropriate under the circumstances presented to reduce the penalty amount proposed; a civil penalty should be and is hereby assessed against Respondent Wademan in the total sum of $50. Such amount is commensurate with Respondent Wademan's apparent ability to pay and it is submitted that such amount should achieve compliance as sought by the Act and regulations.

CIVIL PENALTY

I have hereinabove assessed the following penalties against Respondent Co-Op:

In Case 719:

Count I:	For its failure to notify EPA within 60 days of becoming a RUP dealer as required by 40 CFR 171.11(g)(1)	$2970.00
Count II:	For its failure to keep records as required by 40 CFR 171.11(g)(2)(i) . . .	$4620.00 3/
	Total penalties assessed in Case 719:	$7590.00

In Case 739:

Count I:	For its failure to notify EPA on becoming a RUP dealer (duplication). . . .	No penalty assessed.
Count II:	For its failure to keep records as required by 40 CFR 171.11(g)(2)(i). . . .	$4200.00
Count III:	Making available a RUP to persons not certified applicators	$5000.00
Count IV:	Allegedly holding for sale an unregistered pesticide (DDT)	No penalty assessed.
	Total penalties assessed in Case 739:	$9200.00

I have assessed a total penalty of $50 against Respondent David Wademan for applying a RUP contrary to label directions for the reason that the said David Wademan is not a certified applicator and did not use said RUP

3/ Complainant here proposed that the guideline penalty be increased ten percent, apparently because of a history of prior violations. In view of a like violation under Case No. 739, Count II, the amount is appropriate.

under the direct supervision of a certified applicator, all in violation of Sections 12(a)(2)(F) and 12(a)(2)(G) of the Act.

As stated under the foregoing discussions of the various counts alleged in the subject cases, I find the penalties proposed, where appropriate to be assessed, are consistent with the guidelines, 39 FR 27711 et seq. (July 31, 1974) and the Interim Penalty Guidelines for sale of RUPs to uncertified applicators (June 11, 1981). I further find that said penalty amounts are in accord with FIFRA Compliance Program Policy No. 12.4 (July 22, 1986). Accordingly, there is no reason apparent which justifies an increase or decrease in the Co-Op penalties appropriately proposed.

As stated in Harmack Grain Co., Inc., Docket No. IF&R VIII-150C (May 2, 1986), the Act is primarily a recordkeeping and reporting statute. Accurate and timely reporting is necessary so that EPA may alert the public to any unreasonable adverse effects to human health and the environment which a pesticide may be (found) to cause. Requiring dealers to specifically give notice that they are making RUPs "available for use" enables EPA to determine with certainty what pesticides are being used, and by whom, so as to effectively regulate the sale and use of such toxic substances. We have often pointed out that such regulatory provisions exist for the protection of the public and, for that reason, are liberally construed and broadly interpreted to effectuate the purposes of the Act (see Tcherepin v Knight, 389 US 332, 88 S.Ct. 548 (1967)).

"Restricted use" takes a pesticide out of the hands of the average user and restricts access to trained users who can demonstrate they know when and how to use RUPs, i.e., they are conversant with preventative measures as well as remedial measures, and are aware of the hazards to others in addition to being aware of the need to protect the applicator.

Uses which violate the Act and regulations threaten the benefits available with proper use of RUPs.

Upon consideration of the facts appearing in the record, along with the submissions of the parties, I propose adoption of the following

FINAL ORDER 4/

1. Pursuant to Section 14(a)(1) of the Act, the following civil penalties totaling $16,790.00 are assessed against Respondent Co-Operative Grain & Supply Co. for violations of the Act found herein:

In FIFRA Docket No. VII-719C-86P:	$7590.00
In FIFRA Docket No. VII-739C-86P:	$9200.00

2. Pursuant to Section 14(a)(1) of the Act, a civil penalty in the total sum of $50.00 is assessed against Respondent David Wademan for violations of the Act found herein.

3. Payment of the full amount of the civil penalties assessed shall be made within sixty (60) days of the Service of the Final Order upon said Respondents by forwarding a Cashier's Check or Certified Check payable to the Treasurer, United States of America, to:

EPA - Region 7
(Regional Hearing Clerk)
P.O. Box 360748M
Pittsburgh, PA 15251

DATE: July 30, 1987

Marvin E. Jones
Administrative Law Judge

4/ Unless an appeal is taken pursuant to the rules of practice, 40 CFR 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the Final Order of the Administrator (see 40 CFR 22.27(c)).

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk, Office of Regional Counsel, United States Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas 66101, the Original of the foregoing INITIAL DECISION of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said Section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk (A-110), EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATE: July 30, 1987

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ