UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

IN THE MATTER OF

Century Products, Inc., a/k/a
Clean Earth Products

and

Docket No. I.F.& R.-IV-94F007-C

Dana L. Turner, a/k/a
Organic Technologies, Unlimited,
and DLT Laboratories,

RESPONDENTS

INITIAL DECISION

This proceeding under Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. §1361 (a)) (FIFRA), was commenced by the filing of a complaint on December 28, 1993, charging Respondents Century Products, Inc., a/k/a Clean Earth Products, and Dana L. Turner, a/k/a Organic Technologies, Unlimited and DLT Laboratories (Turner), with one count of violating Section 12 (a) (2) (L) of the Act, 7 U.S. C. § 136j (a) (2) (L) , by producing a pesticide, "Organic Soil and Turf Conditioner", in an establishment not registered with the Administrator of the Environmental Protection Agency (EPA).

Respondent Century Products, Inc. is no longer a party to this action pursuant to a Consent Agreement and Consent Order approved on July 20, 1994. The settlement with Century Products required payment of a penalty of $100 and, because of information obtained during the course of these proceedings as to the toxicity of Organic Soil and Turf Conditioner, Complainant proposes to reduce the penalty assessed against Mr. Turner to $4,400 (Complainant's Response to Second order on Motions, dated March 1, 1996; letter to the ALJ from Complainant's counsel, dated November 7, 1996).

Respondent Turner filed an answer under date of January 14, 1994, denying all allegations in the complaint. On September 22, 1995, the ALJ issued an order denying a plethora of motions filed by Turner which argued essentially that Organic Soil and Turf Conditioner was not a pesticide and that EPA lacked jurisdiction to bring this action. Based primarily on intended use of the product to "prevent, destroy, repel, or mitigate' fire ants, the ALJ concluded that Organic Soil and Turf Conditioner was indeed a pesticide and that Respondent Turner was liable as a matter of law for the violation alleged in the complaint. Accordingly, complainant's motion for an accelerated decision as to liability was granted (Order on Motions). Facts and procedural history of this proceeding are set forth in the mentioned order which is incorporated herein by reference.

Liability having been established, the sole remaining issue concerns the amount of an appropriate penalty. Because there were material issues of fact regarding the statutory factors to be considered in determining a penalty, e.g., gravity of the violation, the size of Respondent's business and the effect of the proposed penalty on his ability to continue in business, Complainant's motion to find hearing on penalty unnecessary was denied (Second Order on Motions, January 24, 1996). The parties were directed to provide certain additional information on or before March 1, 1996. Both parties have responded to this order.

In a conference call conducted on November 7, 1996, for the purpose of scheduling a date for a hearing on this matter, Mr. Turner stated that he intended to waive his right to a hearing. [1/] By letter, dated November 14, 1996, on the letterhead of "DLT LABORATORIES", Mr. Turner confirmed that "I waive my right to hearing". Outlining his reasons, Turner repeated his contention that U.S. EPA has no authority to assess any civil penalty nor legal authority to collect such a penalty, and that Organic Soil and Turf Conditioner is not a pesticide. Characterizing the $100 by which the complaint against Century Products, Inc. was settled as "piddling", he asserted that the penalty [herein], if equitable, would be $5.00. Mr. Turner stated that he would pursue this matter in the Court of Appeals. Mr. Turner's waiver of a right to a hearing is considered as consent that the penalty be determined on the record as presently constituted.

Based on the entire record, I make the following:

FINDINGS OF FACT

1. Respondent, Dana L. Turner, is an individual, who, at all times relevant to this action, conducted business under the names "Organic Technologies" and/or "DLT Laboratories".

2. At the time of the violation, Respondent's business address was 6811 Old Canton Road, Ridgeland, Mississippi 39157 (Complaint at I(A)(5)).

3. At the time of filing of the complaint and answer, Respondent's business address was R2, B192, Diana, Texas 75640 (Complaint at I(A)(5); Answer at 7).

4. Respondent currently maintains business addresses at 4854 Buck Sherrod Road, Marshall, Texas and P.O.B. 246, Scottsville, Texas 75688 (Respondent's Compliance with Administrative Order, dated March 1, 1996, at 1, 4).

5. On or about April 19, 1993, an EPA authorized inspector collected a sample of Organic Soil and Turf Conditioner, Sample No. 0419931010101, at Century Product's facility located at 6751 Highway 431 South, Brownsboro, Alabama 35741 (Complainant's Prehearing Exchange, Exhibit 16: Receipt for Samples).

6. Early in the calendar year 1993, Respondent produced Organic Soil and Turf Conditioner at the facility at 6751 Highway 431 South, Brownsboro, Alabama and held the product for distribution and sale at that location.

7. The facility at 6751 Highway 431 South, Brownsboro, Alabama was not registered with EPA as an establishment for the production of pesticides during the period referred to in finding 6.

8. Advertising materials for Organic Soil and Turf Conditioner, representations of sales agents, and general public practice establish that the only intended use for the product is to prevent, destroy, repel, or mitigate fire ants (See Order on Motions).

9. When he produced, distributed and sold Organic Soil and Turf Conditioner, Turner intended that the product be used to eliminate fire ants and the mounds they create, thus "preventing, destroying, repelling, or mitigating" the ants (See Order on Motions).

10. Complainant determined the proposed penalty in accordance with the July 1990 Enforcement Response Policy for FIFRA (ERP). Appendix A of the ERP classifies the violation at issue here, producing a pesticide in an unregistered establishment (FIFRA § 12(a)(2)(L), as a gravity Level 2 offense,

Level 1 being considered the most serious and Level 4 being the least serious. Complainant concluded that Respondent was in size of Business Category I (revenues over $1,000,000) and, applying a Level 2 offense to a Category I size of business, determined that the penalty should be $5,000 (Penalty Calculation Worksheet, July 19, 1993, Response to Second Order on Motions, Attach. 7; ERP, Tables 1 and 2).

11. Complainant has recalculated the proposed penalty based upon a review of toxicity data submitted by Turner in connection with the registration of aaNKILL 44 (Penalty Calculation Worksheet, February 22, 1996, Response to Second Order on Motions, Attach. 5; letter to the ALJ from Complainant's counsel, dated November 7, 1996). Complainant considered that Organic Soil and Turf Conditioner was similar, if not identical, to aaNKILL 44. Turner's application for registration of the latter product was granted in July 1994. This review resulted in the assignment of gravity values of 1 to pesticide toxicity, human harm, and environmental harm (Penalty Calculation Worksheet, February 22, 1996). In the initial calculation, gravity values of three were assigned to human harm and environmental harm, because the potential for harm in these categories was considered to be "unknown".

12. As indicated, Complainant assigned gravity values of 1 each to pesticide toxicity, harm to humans and environmental harm. Because this was Turner's first FIFRA violation, a value of "0" was assigned to Respondent's compliance history. "Culpability", however, was assigned a value of 4, because the violation was considered to be "knowing and willful, with knowledge of the general hazardousness of the action" (ERP, Appendix B) . The conclusion that the violation was "knowing and willful" was based principally on Turner's awareness, at the time he produced Organic Turf and Soil Conditioner in an unregistered establishment, that both EPA and the Sixth District Court of Appeals of the State of Texas had determined that his product was a pesticide. See Turner v. State, 850 S.W. 2d. 210 (Tex. 1993). Totalling the gravity values equals 7, for which the ERP provides a 10% reduction in the matrix value (Id. Appendix C). This adjustment reduced the amount claimed to $4,500 (Penalty Calculation Worksheet, February 22, 1996, Response to Second Order on Motions, Attach. 5; letter to ALJ from Complainant's counsel, dated November 7, 1996). After crediting the $100 received in the settlement with Century Products against the total penalty, the penalty sought from Turner is $4,400.

13. There is no evidence in the record to support the determination that Respondent's annual revenues equalled or exceeded $1,000,000. Complainant apparently relied in part on the ERP provision that where information as to the

size of a respondent's business is not readily available, the Category I size of business will be used to calculate the penalty (Id. 21). Complainant says that D&B searches revealed no listings for Dana L. Turner or Organic Technologies, Unlimited (Response to Second Order on Motions). Moreover, it appears that one of Turner's businesses, aaNKILL 44, Inc. , was dissolved by the State of Texas as of February 2, 1993. [2/] DLT Laboratories was incorporated on February 2, 1995.

14. A D&B report on DLT Laboratories, Inc., dated February 15, 1996, does not contain any information on annual sales (Response to Second Order on Motions, Attach. 2). The report does indicate, however, that DLT Laboratories employed 17 people including the owner. This appears to be inconsistent with an IRS form, dated September 18, 1995, which indicates that DLT Laboratories had no employees for which it was required to submit a tax return (Respondent's Compliance With Administrative Order, dated March 1, 1996, Attach. A).

15. The Wall Street Journal, edition of January 25, 1995, contained an article quoting Mr. Turner as claiming to have sold 10,000 gallons of aaNKILL 44 at $40.00 a gallon (Response to Second Order on Motions, Attach. 3). Although the period of time over which these sales were made is not stated, Complainant points out that aaNKILL 44 was registered by EPA on July 25, 1994, six months prior to publication of the Wall Street Journal article. Complainant therefore asserts that $400,000 represents six months of sales and that revenue over the full year could be projected to total at least $800,000.

16. EPA Form 3440-16, Pesticides Report For Pesticide-Producing Establishments, submitted by Turner to EPA in March 1995, to comply with FIFRA § 7, is in the record. The form contains production and sales data. Although this data is confidential business information and may not be disclosed in this decision, the data have been reviewed. Suffice it to say, that I simply do not agree that the data support Complainant's assumptions as to the size of Respondent's business. I find that, for penalty calculating purposes on this record, Respondent, at most, should be placed in Business Category II, that is, revenues of $300,000 to $1,000,000.

C 0 N C L U S I 0 N S

1. Respondent Turner is a person, as defined by FIFRA § 2(s), 7 U.S.C. § 136(s), and is subject to FIFRA and the regulations promulgated thereunder.

2. Respondent was a producer and distributor of Organic Soil and Turf Conditioner.

3. Organic Soil and Turf Conditioner is a pesticide within the meaning of FIFRA § 2 (u) , 7 U. S. C. § 136(u) , and is subject to FIFRA regulation.

4. The facility at 6751 Highway 431 South, Brownsboro, Alabama, was not registered with EPA as an establishment for the production of pesticides.

5. Respondent Turner violated FIFRA § 12(a)(2)(L), 7 U.S.C. § 136j(a)(2)(L), by producing a pesticide, Organic Soil and Turf Conditioner, in an unregistered establishment, 6751 Highway 431 South, in violation of FIFRA § 7 (a) , 7 U.S.C. § 136e) (a) .

6. For this violation, an appropriate penalty is the sum of $3,500.

D I S C U S S I 0 N

In determining a penalty for violations of FIFRA, the Administrator [or her designee] must 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." FIFRA § 14 (a) (4), 7 U.S.C. § 1361 (a) (4) . The ALJ must also consider the respondent's history of compliance with the Act and any evidence of good faith or lack thereof. 40 CFR § 22.35(c).

Although not bound by penalty guidelines, the ALJ must consider any guidelines issued by the Agency concerning the assessment of civil penalties. 40 CFR § 22.27(b). The guidelines, appearing in the July 1990 Enforcement Response Policy for FIFRA (ERP), establish a five stage process for determining a penalty: 1) determining the gravity level of the violation, 2) determining the size of the violator's business, 3) determining the base dollar amount of the violation using the table of gravity and business levels, 4) adjusting the level of base penalty in consideration of the pesticide's characteristics, potential harm to human health and/or the environment, and the violator's compliance history and culpability, and 5) considering the effect of payment on the violator's ability to continue in business.

Complainant determined the gravity of the violation in accordance with Appendix A of the ERP, which classifies the violation at issue here, producing a pesticide in an unregistered establishment, FIFRA § 12(a)(2)(L), 7 U.S.C. §

136j(a)(2)(L), as a Gravity Level 2 offense. Complainant then considered that Respondent's gross revenues were over $1,000,000, placing Respondent in "Business Category I" (ERP, Table 2). This is in accordance with the ERP which provides at 21 that when information concerning an alleged violator's size of business is not readily available, the penalty will be calculated using the Category I size of business.

In response to the Second Order on Motions, Complainant explained that it had made several attempts, prior to filing the complaint, to ascertain the size of Respondent Turner's business. [3/] Complainant says that it did not attempt to obtain further business information directly from Mr. Turner through discovery, because "Mr. Turner has been extremely uncooperative in this matter, refusing to produce financial documents even when so instructed by this Court."[4/] Complainant urged Respondent to submit financial information (Complaint §C) and the Second Order on Motions suggested that it would be in Mr. Turner's best interest to do so.[5/] Nevertheless, Mr. Turner has not submitted tax returns, production data or other documentation of gross sales to challenge EPA's categorization of the size of his business.

Complainant concluded that Business Category I was appropriate by conducting several searches of Dun & Bradstreet (D&B), a private business information data base, referring to newspaper articles which quoted Turner's statements regarding his business sales, and reviewing sales and production data (EPA Form 3540-16) submitted by Turner to comply with FIFRA § 7 (Response to Second Order on Motions). In the absence of more specific data such as financial statements or copies of income tax returns, Complainant may use general business information and other secondary sources to assess the size of a respondent's business and the impact of a proposed penalty on the firm's ability to continue in business. In this case, however, Complainant has not demonstrated that Respondent's gross revenues equalled or exceeded one million dollars per year.

Complainant's D&B searches revealed no listing for Dana Turner or Organic Technologies, Unlimited. Mr. Turner's business, aaNKILL 44, Inc. was dissolved by the State of Texas as of February 2, 1993. DLT Laboratories was incorporated on February 2, 1995. A February 1996 D&B report on DLT Laboratories no information on sales, but did indicate that the firm employed 17 people (finding 14). This appears to be inconsistent with an IRS form submitted by Respondent which indicates that DLT Laboratories had no employees for which it was required to submit a tax return (See Respondent's Compliance with Administrative Order, dated March 1, 1996, Exhibit "A") .

Relying on a 1995 Wall Street Journal article, which quoted Turner's statements as to the price and quantity of aaNKILL 44 sold, and the fact that EPA registered aaNKILL 44 six months before the Wall Street Journal article was published (finding 15), Complainant concluded that Respondent's sales totalled $400,000 for six months. According to Complainant, sales could be projected to total at least $800,000 for the year. Even if it is appropriate to assume that Respondent's sales totalled $800,000 for the year 1995, this does not establish gross sales equalling or exceeding $1,000,000 annually. The penalty will, therefore, be determined by placing Respondent in Business Category II: revenues of $300,000 to $1,000,000.

Sales and production data submitted on Form 3540-16 are treated as confidential business information unless confidentiality is waived by the submitter. While the data has been reviewed, the data provide no basis for altering the conclusion above that, at most, Respondent should be placed in Business Category II. Projections of anticipated future production do not establish the size of a respondent's business. See ERP at 20 ("Size of business is determined by an individual's or a company's gross revenues f rom all sources during the calendar year").

Applying the ERP matrix for FIFRA § 14 (a) (1) , a Level 2 violation by a Business Category II violator results in a $4,000 base penalty. This figure is subject to adjustment, considering the pesticide's characteristics, potential harm to human health and/or the environment, and the violator's compliance history and culpability. Because the label contained the signal words, "Warning" and "Caution," and there were no known chronic effects, a gravity (toxicity) Level "1" was assigned to the product at issue here, Organic Soil and Turf Conditioner. A more toxic product would be assigned higher numerical levels. A value of "1" was applied to "harm to human health and environment", because the potential or actual harm to human health was minor, "neither serious nor widespread," and the potential for harm to the environment was minor, "neither serious, widespread, nor substantial." (ERP, Appendix B).

In determining the proposed penalty, Complainant used a compliance history value of "0", because this is Respondent's first FIFRA violation. Culpability, however, was assigned a value of "4", because the violation was considered to be "knowing or willful, with knowledge of the general hazardousness of the action." This conclusion was principally based on Turner's awareness at the time he manufactured Organic Soil and Turf Conditioner in an unregistered establishment that both EPA and the Sixth District Court of Appeals of the State of Texas had determined that his product was a pesticide subject to EPA

regulation (See, Turner v. State, 850 S.W.2d 210 (Tex. 1993). Mr. Turner manufactured Organic Soil and Turf Conditioner despite his knowledge that neither the product nor the establishment in which it was produced were registered with EPA. These facts are sufficient to support assignment of a culpability value of "4" to Turner's actions herein.

Totalling the adjustment factors of "1" each for pesticide toxicity, harm to human health, and the environment; "0" for history of compliance and "4" for culpability results in a value of "7", for which the ERP provides for a 10% reduction in the base penalty (ERP, Appendix C). This reduces the proposed penalty from $4,000 to $3,600.

The Act and the ERP require the Agency to "consider" the effect of the penalty on the person's ability to continue in business. This factor, however, does not differ significantly from the "appropriateness of the penalty to the size of the business of the person charged" and EPA's consideration of production and sales information, albeit limited in extent, as detailed above is prima facie sufficient to satisfy EPA's burden in this regard. EPA having satisfied its obligation under the statute to consider the economic impact of the proposed penalty on Respondent's business, the burden shifts to Respondent to present evidence demonstrating that the proposed penalty would jeopardize his ability to remain in business (New Waterbury, supra note 3). Turner has submitted very little evidence to challenge EPA's conclusions. He has stated, however, that the net profit from his registered aaNKILL pesticide production was less than $20,000 since the beginning of marketing in 1995 (Compliance With Administrative Order, March 1, 1996). Mr. Turner alleges that DLT Laboratories' net profit is less than $20,000 and that his total [income] tax payment for 1995 would be less than $720. DLT Laboratories was incorporated in February of 1995 and it does not appear that these figures include Turner's income or that of Organic Technologies, Unlimited. Moreover, these assertions are not supported by financial statements, income tax returns or other data and are considered inadequate to refute Complainant's determination that the penalty should not effect Turner's ability to remain in business.

Complainant proposed to reduce the penalty assessed against Turner by the $100 paid by Century Products, Inc. The penalty will be so reduced.

It is concluded that Complainant has satisfactorily explained its method of determining the penalty, that this method complies with FIFRA § 14(a)(4), and that, on this record, a penalty of $3,500 is reasonable. Accordingly, a penalty

of $3,500 will be assessed against Respondent Turner for the FIFRA violation found herein.

ORDER

Dana L. Turner, a/k/a Organic Technologies, Unlimited, and DLT Laboratories, having violated the Federal Insecticide, Fungicide and Rodenticide Act as alleged in the complaint, a penalty of $3,500 is assessed against him in accordance with Section 14 (a) (1) of the Act, 7 U.S.C. § 1361(a). [6/] Payment of the penalty shall be made by submitting a cashier's or certified check in the amount of $3,500 payable to the Treasurer of the United States to the following address within 60 days of the date of this order: [7/]

Regional Hearing Clerk
U.S. EPA, Region IV
P.O. Box 100142
Atlanta, GA 30384

Dated this 18th day of February 1997.

Spencer T. Nissen
Administrative Law Judge

[1/] When Mr. Turner asked what would happen if an order assessing a penalty were issued and he declined to pay it, he was informed that eventually the matter would be forwarded to the Department of Justice which would bring an action against him to collect the penalty.

[2/] Turner had apparently named a corporation after his product, aaNKILL 44 (Response to Second Order on Motions, Attach. 1).

[3/] Complainant's Response to Second Order on Motions, dated March 1, 1996, at 1-2. "As part of the Complainant's prima facie case at a penalty hearing, it must present 'some evidence regarding [R]espondent's general financial status from which it can be inferred that [R]espondent's ability to pay should not affect the penalty amount.'" Second Order on Motions at 14, quoting In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994).

[4/] Complainant's Response to Second Order at 2, citing Order of July 6, 1994 and Turner's Motion to Find Pre-Hearing Conference Unnecessary, dated, August 10, 1994. The July 6, 1994 Prehearing Exchange Order stated, inter alia, "If

Respondent is contending that the proposed penalty exceeds its ability to pay, submit financial statements, copies of income tax returns, or other data to support such contention." The Second Order on Motions at 11 and 15, however, explained that "although Respondent has not, to date, provided any financial information, this may be because he has continued to maintain that he is not liable for any penalty and such information is not relevant ... Turner will, therefore, be permitted an opportunity to provide information regarding the size of his business, his ability to pay the penalty, and the effect payment would have on his ability to remain in business... Respondent is informed that if he cannot, or will not, provide financial statements and other information regarding his ability to pay or the effect of the penalty on his business, inferences may be drawn in Complainant's favor, and these issues may not be raised in a subsequent appeal."

[5/] The Complaint at 3 stated, "Complainant will consider each Respondent's financial condition in mitigating the proposed penalty, insofar as is necessary to permit Respondents to continue in business. In order to have its financial condition considered, each Respondent must submit certified financial information."

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

[7/] Turner has indicated that he intends to have this matter reviewed by the [U.S.] Court of Appeals (letter, dated November 14, 1996). In order to do so or in order to have any chance of successfully defending an action by the government to collect the penalty (See FIFRA § 14 (a) (5)) , he must comply with a judicially created doctrine known as "exhaustion of administrative remedies". Applied here, the doctrine requires an appeal to the EAB. In any such appeal, the validity of the ALJ's prior orders may be placed at issue.