UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
HOVEN CO-OP SERVICE COMPANY,	)	**DOCKET NO. FIFRA-8-99-31**
	)	
	)	
RESPONDENT	)	

Federal Insecticide, Fungicide and Rodenticide ActBPesticide Production Reports-Determination of Penalty-Enforcement Response Policy.

While the ERP was considered to be reasonable and would be followed to the extent it provides that the remedy for violation of FIFRA § 7(c), failure to file a pesticide production report, is a penalty rather than a warning under FIFRA § 14(a)(4), ERP was disregarded in assessing penalty where Complainant's practice in accordance with the ERP was to assess all penalties for non-filing of pesticide production reports at the maximum and penalty so determined overstated the gravity of the violation.

Appearance for Complainant: Dana J. Stotsky, Esq.
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U.S. EPA, Region 8
Denver, Colorado

Appearance for Respondent: Frederic R. Moulton, Esq
Attorney at Law
Watertown, South Dakota

Initial Decision

This proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, 7 U.S.C. § 136l, was commenced on September 27, 1999, by the filing of a complaint charging Respondent, Hoven Co-op Service Company (Hoven Co-op) with failure to file a pesticide production report, EPA Form 3540-16, for the calendar year 1998, on or before March 1, 1999, as required by Section 7(c) of the Act and 40 C.F.R. § 167.85(d).[1/]

For this alleged violation, Complainant seeks a penalty of $4,400.

In a letter, dated November 1, 1999, signed by Francis Karst, manager, Hoven Co-op acknowledged receipt of the complaint and proposed fine on October 4, 1999. The letter alleged, however, that Hoven Co-op had not received the blank production report [form] and that nobody at Hoven Co-op had any knowledge of it. The letter further recited that he, Karst, had received a call from EPA in July of 1999 and was asked if Hoven Co-op still had bulk pesticide tanks. The answer was in the affirmative and Mr. Karst was reminded of the pesticide production report which should have been filed by March 1, 1999. Mr. Karst then asked for a report form

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[1/] The complaint cites an outdated version of the regulation, 40 C.F.R. § 167.5(c) (1988), rather than § 167.85(d) (1999) for the requirement that pesticide production reports for the calendar year are to be filed on or before March 1 of the succeeding year. Because there is no indication that this mis-citation caused any confusion or doubts as to the nature of the violation, it will be disregarded.

which was allegedly received, filled out and mailed to EPA within a few days. In conclusion, the letter stated that Hoven Co-op had always tried to obey the law and reiterated that, if the report [form] had been received, it would have been filled out. Hoven Co-op stated that it did not believe that it should be fined this big of an amount and that it wished to appeal. This letter was interpreted as contesting the amount of the proposed penalty and as a request for a hearing.

A hearing on this matter was held in Selby, South Dakota on July 12, 2000.

Based on the entire record, including the proposed findings and briefs submitted by the parties,[2/] I make the following:

Findings Of Fact

1. Hoven Co-op Service Company, Hoven, South Dakota, is a cooperative non-profit association and thus a person as defined in Section 2(s) of the Act.

2. Hoven Co-op's facility is a registered EPA establishment, EPA Establishment No. 062125-SD-001. FIFRA § 2(dd) and 40 C.F.R. § 167.3 define "establishment" in part as meaning any site

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[2/] Respondent objects only to Complainant's proposed finding that the production report form (EPA Form 3540-16) and instructions were provided to Hoven Co-op by first class US Mail on or about November 25, 1998, and [in any event] on or before December 10, 1998 (Respondent's Proposed Findings of Fact, Conclusions of Law and Proposed Order, dated September 14, 2000).

where a pesticide product, active ingredient or device is produced.

3. FIFRA § 2(w) defines “produce” as meaning to manufacture, prepare, compound, propagate, or process any pesticide, or device or active ingredient used in producing a pesticide. The regulation, 40 C.F.R. § 167.3, expands the definition of “produce” by adding the language “to package, repackage, label, re-label, or to otherwise change the container of any pesticide or device.”

4. FIFRA § 7(c) prohibits the production of a pesticide in any state unless the establishment in which it is produced is registered with EPA and FIFRA § 7(c) requires any producer operating an establishment registered under that section to inform the Administrator within 30 days after it is registered of the types and amounts of pesticides and, if applicable, active ingredients used in producing pesticides-(A) which the producer is currently producing; (B) which the producer has produced during the past year; and (C) which the producer has sold or distributed during the past year. This information is to be kept current and submitted to the Administrator annually under such regulations as the Administrator may prescribe. The regulation, 40 C.F.R. §§ 167.85(c) and (d), requires that reports be made on forms [EPA Form 3540-16] supplied by the Agency and that reports be submitted by March 1 of the

succeeding year even if no pesticides were produced for the reporting year.

5. Mr. Timothy Osag, senior enforcement coordinator for FIFRA in Region 8, described EPA's practice of mailing the forms and instructions for completing pesticide production reports to all registered pesticide producing establishments referred to as the "solicitation list" (Tr. 8, 17, 18). The forms are mailed from EPA's office in Washington, D.C., in late November or early December of the reporting year and, although the letter in the record is dated December 10, 1998 (C's Exh 6), Mr. Osag testified that the 654 registered establishments in EPA Region 8, including those in South Dakota, were solicited during the last week in November.[3/] By reference to a portion of the solicitation list (C's Exh 11), he stated that the mentioned letter was sent to Hoven Co-op.

6. Mr. Francis Karst, manager of Hoven Co-op, described the Co-op's repackaging operations with regard to pesticides. He testified that the Co-op received pesticides in semi-loads of 1,000 to 1,200 gallons and that the farmers pick it up in what he referred to as "shuttles" of 100-gallon capacity which are labeled with the product placed in the shuttle (Tr. 32).

[3/] Tr. 12, 18. Complainant's prehearing exchange, however, states that the letter was sent to Respondent via first class mail on December 14, 1998 (Id. 5).

7. Mr. Karst, who has been manager of Hoven Co-op for 21 years, testified that he had been filing pesticide production reports for about five years or since 1993 (Tr. 23, 30). He stated that in a phone call in July 1999 EPA inquired whether Hoven Co-op was still in the bulk pesticide [business] and when he answered yes, he was reminded that he had not filed the pesticide production report form (Tr. 29, 30). He was surprised to learn that he had not filed the form for 1998. [4/] His practice was to keep a copy of all pesticide production forms submitted to EPA, but when he pulled out his file the form [for 1998] wasn't there (Tr. 30, 31).

8. When asked whether he had received the pesticide production report form from EPA in late 1998 or early 1999, Mr. Karst replied "(n)ot to my knowledge." (Tr. 23). Asked whether it was possible that the December 1998 letter [enclosing the pesticide production report form and instructions] had been received and somehow misplaced in his office, he replied that he did not know how it could have been (Tr. 30). Describing procedures for handling mail at Hoven Co-op, he testified that

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[4/] Tr. 23, 24, 29, and 30. A Conversation Record reflects that Mr. Karst placed a call to EPA on August 2, 1999 (C's Exh 4). The call was apparently placed after receipt of the July 28 letter from EPA (finding 9) and indicates that Mr. Karst described Hoven Co-op's operations with respect to pesticides as the "repackag[ing] of corn herbicides". The Conversation Record indicates that Mr. Karst did not believe that herbicides were pesticides, but that he agreed to fill out the [pesticide production report] form and send it to EPA.

the mail is brought from the mail box by the secretary and placed in his in-box and that he personally goes through the mail and places it in the different categories [for action].

9. In a letter, dated July 28, 1999, EPA notified Hoven Co-op that it had reason to believe that Hoven had violated FIFRA § 7(c) by failing to file its 1998 production report which was due on March 1, 1999 (C's Exh 2). Enclosed with the letter was a copy of EPA Form 3540-16 and, among other things, Hoven was informed of EPA's intent to file a civil administrative complaint in this matter unless it received documentation that Hoven Co-op had complied with its 1998 reporting requirements. Mr. Karst acknowledged that Hoven Co-op received the letter (Tr. 20). He testified that he filled out the form within 24 hours of its receipt. Hoven Co-op's production report form for 1998, dated August 2, 1999, is in the record (C's Exh. 3). This report indicates that Hoven Co-op repackaged or re-labeled three restricted use herbicides totaling less than 3,500 gallons.

10. Mr. Karst testified that both he and Hoven Co-op's Board [of Directors] considered the fine to be very excessive (Tr. 26). Under cross-examination, he stated that Hoven Co-op had 536 members and that payment of the $4,400 fine would require an assessment of $8 or $9 per member (Tr. 27, 28).

11. Mr. Osag explained the calculation of the proposed penalty with reference to the Penalty Calculation Narrative (C's Exh 1) which he had prepared. (Tr. 14). The Narrative states and he testified that the penalty was determined in accordance with the 1990 Enforcement Response Policy for FIFRA (ERP) (C's Exh 9). The ERP provides that the February 10, 1986, FIFRA ERP is to be used to determine the appropriate enforcement response for FIFRA § 7(c) violations (Id. 1). The 1986 ERP in turn provides that, if a pesticide production report is not submitted within 30 days of the due date, it will be considered non-reporting for which the appropriate remedy is a civil penalty [as distinguished from a warning under FIFRA § 14(a)(4)].

12. The gravity of the violation was determined using Appendix A of the 1990 ERP. Appendix A identifies a violation of FIFRA § 7(c)(1) (FIFRA § 12(a)(2)(L)) as Level 2. The next step is to determine the size of the business of the violator. Because the Agency did not have any information as to the size of Hoven Co-op's business, it was placed in Category I, sales of over a million dollars (Narrative). Mr. Osag testified that the guidance recommended or required that a company whose sales were unknown be placed in the larger category with the understanding that, if information became available at a later date that this was incorrect, the penalty would be adjusted

(Tr. 15, 16). This matter was specifically raised in the letter to Hoven Co-op, dated July 28, 1999 (C's Exh 2), and Hoven Co-op was informed that, if its [annual] sales were not in fact over a million dollars, it should document that fact by providing signed copies of its income tax returns for the previous three years. No tax returns or other financial documents have been provided and Hoven Co-op has made no contention that it should be placed in a different sales category.

13. Under the ERP, a gravity Level 2 violation applied to a Category I size of business results in a penalty of $5,000 (Matrix, Id. 19), the maximum for a single violation at the time the ERP was issued. Mr. Osag pointed out, however, that this maximum was increased by 10% by the Debt Collection Improvement Act of 1996 [31 U.S.C. § 3701] so that the base penalty is now $5,500 (Tr. 16). He testified that normally they would then look at what adjustments should be made to the base penalty based upon the specifics of the case such as the chemicals involved, their toxicity, [respondent's] compliance history, culpability of respondent and that type of information. He stated, however, that in this instance the ERP directs that no adjustments be made [to penalties] for record keeping and reporting violations because they are factored into the penalties in the matrix (Tr. 16).

Therefore, the base penalty remained at $5,500. The next consideration was the effect an assessment of $5,500 might have on Hoven Co-op's ability to continue in business. Because of the lack of financial information from Hoven Co-op, no adjustment was made for this factor, although Mr. Osag indicated Complainant's willingness to do so should ability to pay come into consideration (Tr. 17). Lastly, because Hoven Co-op promptly submitted its production report once the omission was called to its attention, a 20% reduction in the proposed penalty was made for good faith to arrive at the amount claimed of $4,400.

14. Mr. Osag explained the purpose and uses made by the Agency of pesticide production reports. He pointed out that the 1972 amendments to FIFRA added a requirement for the registration of any establishment at which a pesticide is produced and that the establishment registration number was required to be on the labeling of any products produced at that establishment (Tr. 9). Additionally, he noted that annually, under regulations developed by the Administrator, the producer operating an establishment must report to the Agency products which are produced, sold or distributed from that establishment. He testified that the Office of Pesticide Programs uses information as to the types of products being

sold and distributed in risk assessments and during the registration process (Tr. 10, 11). In addition, he stated that regional offices and the Office of Enforcement use that information for prioritizing or targeting inspections, compliance and monitoring activities (Tr. 11).

15. Mr. Osag explained that information [as to the types of products being produced, sold or distributed] enabled the Agency to respond to concerns regarding the formulation, mislabeling or contamination of products so that the product may be traced back to the facility where a particular pesticide was produced. Because the Agency knew which companies and which establishments were producing which products, Mr. Osag stated that such information could also be used to address concerns associated with cancellations or suspensions of pesticides and in monitoring efforts for the purpose of confirming that required label changes such as worker protection standards have been accomplished.

16. Asked why the ERP suggests or directs a penalty assessment at or near the maximum for failing to file a pesticide production report, Mr. Osag replied because that reporting requirement fits into the regulatory scheme which serves as the backbone of the regulatory program associated with pesticide regulation, registration and label approval (Tr. 20, 21). He asserted that registration of establishments where pesticides

are produced provides the Agency with information as to pesticides being produced and distributed. He maintained that [this information] forms the very fabric of our regulatory scheme and that without that information the Agency would be powerless to really regulate pesticides.

17. By Notice and Order, dated September 25, 2000, the ALJ informed the parties that he intended to take official notice of the fact that the penalty initially claimed by the Agency in at least the following cases is identical to the $4,400 claimed in the instant proceedings: Walling Water Management Co., Docket No. FIFRA-8-99-45; Dakota Mill & Grain, Docket Nos. FIFRA-8-99-41 and FIFRA-8-99-42; Farmers Union Oil of Tioga, Docket No. FIFRA-8-99-97; Farmers Union Oil Company, Docket No. FIFRA-8-99-50; and Farmers Union Oil Company, Napoleon, Docket No. FIFRA-8-99-46. [5/] The attention of the parties was also invited to Tremont Supply, Inc., Docket No. FIFRA-09-99-46, Initial Decision, 2000 WL 974338 (ALJ, June 30, 2000), wherein the Agency's claimed penalty of $4,400 for failure to timely file a pesticide production report was sustained. The mentioned Notice and Order recited that it was issued in accordance with the Administrative Procedure Act, 5

[5/] The order was also applied to Watertown Co-op Elevator Association, Docket Nos. FIFRA-8-99-56 and FIFRA-8-99-69, two other proceedings in which the penalty claimed for non-reporting of pesticide production was $4,400 in each proceeding.

U.S.C. § 556(e), and that it was intended to allow Complainant an opportunity to demonstrate that, despite apparent rigid adherence thereto, the ERP is treated as guidance rather than a rule. Complainant was directed to furnish a list of cases, not limited to Region 8, initiated within the last 18 months wherein the Agency initially sought a penalty of other than $4,400 for a single instance of pesticide establishment non-reporting. Additionally, Complainant was directed to provide a list of cases, if any, wherein respondent was able to demonstrate special circumstances as provided in the ERP at 26-27 [28], justifying an extraordinary adjustment in the proposed penalty.

18. Complainant responded to the above order under date of November 17, 2000. Among other things, the response states that Complainant agrees with the ALJ that the ERP, not having been promulgated in accordance with all the requirements [of notice and comment] rule-making, is guidance and not a rule (Id. 2). This, of course, misses the point because the issue is not whether the ERP is a rule, which it clearly is not, but whether the Agency treats it as such. While, if asked, Mr. Osag would almost certainly reply that the ERP is guidance rather than a rule, his testimony leaves little doubt that in practice the ERP is treated as binding (findings 11, 12, 13, and 15). This conclusion is supported by the several

proceedings referred to in finding 16 in which Mr. Osag calculated the proposed penalty and in which the penalty sought is also $4,400.

19. Although Complainant argues that the penalties proposed in other instances of late or non-filing of pesticide production reports are not relevant, it has purportedly provided the information directed in the September 25 order for the period April 1, 1999 to October 1, 2000 (Attachment A to Response). The information, which is allegedly the amounts sought in the complaints, reflects that the great majority of the penalties claimed are at the $5,500 maximum for a one-time FIFRA violation or at multiples thereof, e.g., $16,500. [6/] Only two of the listed cases, both from Region 7, show that the penalty sought is $4,400, which presumably is the maximum for a one-time violation less 20% for good faith, while a third case from Region 4, which may be a typographical error, indicates that the penalty claimed is $4,500. Complainant asserts that application of the 20% adjustment for good faith is a matter of discretion and not a rigid adherence to the ERP. Complainant has not furnished any instances where adjustments

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[6/] It is not clear that the cases listed showing the amount sought as the maximum of $5,500 for a one-time violation are the final amounts claimed. For example, the amount claimed in Tremont Supply, Inc., supra, is listed as $5,500, while, as we have seen, the decision indicates that the amount sought and assessed is $4,400.

were made in the proposed penalties for “special circumstance justifying extraordinary adjustments”, asserting that the categories of proposed penalties and final assessments do not enable a determination of whether special circumstances existed in a given case (Id. 3).

Conclusions

1. Respondent, Hoven Co-op Service Company, is a non-profit association and thus a person as defined in Section 2(s) of FIFRA.

2. Hoven Co-op maintains a registered pesticide establishment, EPA Est. No. 06125-SD-001, at which it repackages, re-labels or otherwise changes the containers of pesticides. Under the regulation (40 C.F.R.§ 167.3), pesticide production includes repackaging, re-labeling or otherwise changing the containers of pesticides.

3. Hoven Co-op repackaged and re-labeled or changed the containers of pesticides in 1998 and was required to file a pesticide production report on forms supplied by the Agency [EPA Form 3540-16] with EPA Region 8 on or before March 1, 1999. [7/] Although Hoven Co-op is on EPA's list of registered pesticide producing establishments and thus on the solicitation or mailing list for EPA Form 3540-16 and instructions, the record will not support a finding that Hoven Co-op received the mailing for the 1998 reporting year. The regulation (40 C.F.R. §§ 167.85(c) and (d)), however, makes it

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[7/] The obligation to submit a report is founded on the operation of a registered establishment and exists irrespective of whether there is in fact pesticide production (40 C.F.R. § 167.85(d)).

clear that it is the responsibility of the operator to obtain the necessary form and submit the report.

4. Hoven Co-op did not mail to EPA the form reporting pesticide production for 1998 until August 2, 1999, which was after this omission had been called to its attention. Hoven Co-op thus violated FIFRA § 12(a)(2)(L), which makes it unlawful for any person who is a producer to violate any of the provisions of Section 136(e) [FIFRA § 7(c)] [Registration of Establishments] of this title.

5. In calculating the proposed penalty of $4,400, Complainant utilized the 1990 Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act (ERP). Although the ERP will be followed to the extent it provides through the 1986 ERP that the remedy for a pesticide production report submitted more than 30 days after the due date is a penalty rather than a warning under FIFRA § 14(a)(4), it is concluded that the penalty calculated by Complainant overstates the gravity of the violation both from the standpoint of harm to the regulatory program and gravity of the misconduct. It is concluded that the ERP will be disregarded in determining the penalty for the violation herein found as I am permitted to do by Consolidated Rule 22.27(b) (40 C.F.R. Part 22) and that an appropriate penalty is the sum of $1,000.

Discussion

Because Hoven Co-op did not receive EPA's mailing of the form (EPA Form 3540-16) and instructions for filing a pesticide production report for the calendar year 1998 and because no damage or harm to the environment allegedly resulted from its failure to comply with the March 1, 1999, due date for filing the report, Hoven Co-op argues that no penalty should be assessed.

Hoven Co-op was on EPA's list of registered establishments and thus on the mailing or solicitation list and Complainant asserts that the presumption of delivery from mailing should apply (Brief, dated August 31, 2000, at 6). While it is well settled that there is a presumption of delivery when an item properly addressed and bearing the proper postage is placed in an appropriate receptacle for the receipt of U.S. mail, the solicitation in this instance was from EPA's Washington office and Complainant's evidence does not establish proper mailing, but only that Hoven Co-op was on the solicitation list. Accordingly, the presumption of delivery from mailing is not applicable and it is concluded that the record will not support a finding that Hoven Co-op received the form at the time of the EPA solicitation in November or December 1998. Although pesticide production reports are to be submitted on a form supplied by the Agency, the regulation (40 C.F.R. § 167.85(c)) makes it clear that it is the responsibility of companies [operators of registered establishments] to obtain the form and submit the report.

Therefore, Hoven Co-op's failure to receive the form does not relieve it of the responsibility to submit the report and its failure to receive the form is a matter only to be considered in mitigation of any penalty.

The 1986 ERP for FIFRA § 7(c), as we have seen, provides that the remedy for submitting a pesticide production report more than 30 days past the due date is a penalty rather than simply a warning. The ERP states that EPA considers violations of the Section 7(c) reporting requirement to be serious, because it impacts the Agency's risk assessment capability as well as its ability to effectively target inspections (Id. 1). The ERP also states that it [pesticide reporting] is the major mechanism for determining the pesticides an establishment is producing. Mr. Osag confirmed the importance of the reporting requirement to the FIFRA regulatory program (findings 14-16). Significantly, he also alluded to the requirement that the EPA number of the registered establishment where a pesticide is produced appear on all pesticide labeling. [8/] Because pesticide production reports are only submitted annually, it would appear to be obvious that the source of a misbranded or adulterated pesticide may more readily be traced

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[8/] Although the primary labeling on the pesticide product which Hoven Co-op repackages or on which it changes the containers of the pesticides is that of the registrant, the regulation, 40 C.F.R. §§ 156.10(a)(v) and 156.10(f), requires that the registration number of the final establishment at which the product is produced also appear on the label.

through the establishment number on the labeling rather than through the reporting requirement at issue here. Be that as it may, the primary standard established by the Act for approving pesticide registration is that the pesticide not cause unreasonable adverse effects on the environment when used [as intended]. Moreover, lack of essentiality may not be made a criterion for denying pesticide registration.[9/] It is therefore unlikely that the quantities of pesticides produced and distributed can or do play any significant role in decisions to register pesticides. Such data may, however, be useful or required in considering whether to cancel the registration of a pesticide where the availability of substitutes may be a significant factor in the decision. From the foregoing analysis, it is likely that Complainant is overstating the importance of pesticide production reporting under the circumstances present here which, as we shall see, is a component of the gravity of the violation. Nevertheless, pesticide production reporting is a statutory and regulatory requirement, which, however doubtful its utility may be as to registration matters, is useful in enabling the Agency to target inspections and enforcement

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[9/] FIFRA § 3(c)(5) provides in pertinent part: The Administrator shall register a pesticide if the Administrator determines that, when, considered with any restrictions imposed under subsection (d) of this section-.....(D) when used in accordance with widespread and commonly recognized practice it will not generally cause unreasonable adverse effects on the environment.

The Administrator shall not make any lack of essentiality a criterion for denying registration of any pesticide.

activities at those establishments having the greatest pesticide production. It is therefore concluded that the ERP, to the extent it provides that the remedy for the submission of a pesticide production report more than 30 days past the due date is a penalty rather than a warning, is reasonable and will be followed.

A different conclusion is reached as to utilizing the ERP in determining the penalty. Complainant, in this and other instances of penalties for failure to file pesticide production reports, rigidly adheres to the ERP by determining the maximum penalty and then allowing an adjustment thereto for good faith only if the respondent promptly submits the report after the failure is called to its attention. In practice then, Complainant treats the ERP as if it were a rule rather than merely guidance. In an analogous case, a penalty guide, which was labeled a "policy statement", but which was followed in the overwhelming majority of cases, was held to be subject to notice and comment rule-making procedures of the Administrative Procedure Act and thus the guide was set aside, notwithstanding repeated Commission statements that it retained discretion to depart from the guide. U.S. Telephone Association v. Federal Communications Commission, 28 F. 3d 1232 (D.C. Cir. 1994). See also Pacific Refining Company, EPCRA Appeal No. 94-1, 5 E.A.D. 607 (EAB, 1994) (dissenting opinion).

Here, Complainant has objected to the ALJ's order that information as to penalties sought in other cases of failure to

file pesticide production reports be provided, arguing that the penalties sought in other cases are not relevant (Response, dated November 17, 2000, at 4). This argument is wide of the mark and is rejected, because the evidence is sought not to determine the penalty in this particular instance, but as relevant to Complainant's practice in adhering to the ERP. In this regard, while Complainant disputes any notion that it rigidly adheres to the ERP, it acknowledges that its approach in proposing identical penalty assessments in this and similar cases is consistent with long-standing EPA policy (Id. 6). This merely confirms the conclusion above that in practice Complainant treats the ERP as a rule.

Citing what it refers to as the seminal case of Employers Insurance of Wausau and Group Eight Technology, Inc., TSCA Appeal No. 95-6, 6 E.A.D. 735 (EAB, 1995), Complainant asserts that it is error in a case such as the instant one, where Complainant has given clear notice of its intent to rely on an applicable penalty policy to support its penalty assessment and Respondent has not challenged any of the factual predicates underlying the policy, for the ALJ to demand additional evidence to support the policy where no such demand was made during the hearing. As noted previously, the additional evidence here was sought to show Complainant's practices with respect to the ERP and not to support any factual or legal predicates upon which the ERP is based.

Employers Insurance reinforces the long-standing rule that the ALJ may disregard the ERP as long as he sets forth his reasons for doing so and the EAB's decision in that case is inapplicable here. Moreover, the decision to disregard the ERP is not based solely or even primarily upon information provided in response to the September 25 order, but upon the conclusion that Complainant has overstated the gravity of the violation.

FIFRA § 14(a)(4) provides that in determining the penalty, the Administrator shall consider, inter alia, the "gravity of the violation".[10/] Gravity of the violation is generally considered from two aspects: the gravity of the harm or potential for harm and the gravity of the misconduct. In James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2, 5 E.A.D. 595 (EAB, 1994), the EAB reduced the penalty for each of seven counts of application of a restricted-use pesticide by an applicator who was not certified from $4,000 to $1,000, even though prima facie these were serious violations and the penalty proposed in the complaint was computed in accordance with the ERP. The EAB, while endorsing the ALJ's conclusion that the real harm [was to the regulatory program] in that it undercut the State's program for the certification of

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[10/] FIFRA § 14(a) provides in pertinent part: (4) Determination of Penalty-In 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.

restricted-use applicators, concluded that the [penalty] formulation in the ERP overstated the gravity [of the violation].

The same conclusion is applicable here to Hoven Co-op, which the record shows repackaged, re-labeled or changed the containers on less than 3,500 gallons of pesticides (restricted-use herbicides) in the calendar year 1998. It is concluded that a penalty substantially less than that sought will amply compensate for any harm to the regulatory program and deter future violations by Hoven Co-op and firms similarly situated. Moreover, Hoven Co-op promptly submitted the report once the omission was called to its attention, thus supporting the conclusion that its failure to timely file the production report was inadvertent because it did not receive the 1998 mailing of the report form and instructions from EPA. Thus, the gravity of the misconduct is slight or minimal.

It is concluded that an appropriate penalty is the sum of $1,000, which will be assessed.

Order

Hoven Co-op Service Company having violated FIFRA §§ 7(c) and 12(a)(2)(L) as alleged in the complaint, a penalty of $1,000 is assessed against it in accordance with FIFRA § 14(a)(4). [11/]

[11/] Unless this decision is appealed to the Environmental Appeals Board in accordance with Rule 22.30 (40 C.F.R. Part 22) or unless the EAB elects to review the same sua sponte as therein provided, this decision will become the final decision of the EAB (continued...)

Payment of the full amount of the penalty shall be made by delivering a cashier's or certified check in the amount of $1,000 payable to the Treasurer of the United States to the following address within 60 days of the date of this order:

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

Dated this 20th day of February 2001.

Original signed by undersigned
_____
Spencer T. Nissen
Administrative Law Judge

[11/] (...continued)
and of the Agency in accordance with Rule 22.27(c).