9/29/77

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the matter of	)	
	)	
Evergreen Pest Control,	)	I.F. & R. Docket No. IX-157C
	)	
Respondent.	)	

INITIAL DECISION

This is a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), Section 14 (a)(1), 7 U.S.C. 136 l(a)(1) (Supp V, 1975), for assessment of a civil penalty for alleged violation of the Act. It was instituted by a complaint issued on September 13, 1976, by the United States Environmental Protection Agency ("EPA") charging Evergreen Pest Control ("Evergreen"), with using the registered pesticide METHYL BROMIDE 99.5% (EPA Reg. No. 8536-12) in a manner inconsistent with its label in violation of FIFRA Section 12 (a)(2)(G).[1/] The penalty proposed to be assessed is $2,550.00.

1/ A list of the pertinent sections of FIFRA with parallel citations to Title 7 of the United States Code, Supp V, 1975, is appended hereto.

Evergreen filed an answer, and an amended answer, in which it contested the imposition of a civil penalty on both procedural and substantive grounds. A hearing was requested.

A hearing was then held in San Jose, California, on May 23, 1977. Following the hearing the parties submitted proposed findings of fact, conclusions of law and briefs on the legal issues. These submissions have been considered, and all proposed findings not specifically adopted herein are rejected.

FINDINGS OF FACT

1. Evergreen is a sole proprietorship owned by Merl Walker.
2. Evergreen fumigates for hire houses and other structures. In the normal course of its business, Evergreen supplies the pesticide for the fumigation, and generally keeps a stock of the pesticides it uses on hand at its premises.
3. On December 16, 1975, Evergreen was engaged as a subcontractor by Western Exterminator Company to fumigate a home located at 877 Marin Drive, Mill Valley, California.
4. The fumigation of the residence was done on December 22, 1975, by two employees of Evergreen, David Carbone and Lance Ferguson.
5. Evergreen supplied the fumigant to do the fumigation. This was the registered pesticide Methyl Bromide 99.5% (EPA Reg. No. 8536-12) consisting of 99.5% Methyl Bromide and 1/2% Chloropicrin. Methyl Bromide is a highly toxic, odorless, colorless gas, and the Chloropicrin (which causes the eyes to tear) is added as a warning against the hazards of overexposure to Methyl Bromide. Evergreen had purchased the fumigant from Soil Chemicals Corporation.

6. The label for the Methyl Bromide contained the following direction: "Do not spill or discharge contents outside of areas confined for treatment...."
7. In order to keep the gas from being spilled or discharged outside of the treated area in accordance with the label's directions, the house being fumigated was enveloped in a tarpaulin cover before the fumigant was applied. Several tarpaulins were used which were joined together by rolling the edge of one tarpaulin into the edge of the other and using spring clamps to hold the tarps together. The base of the tarpaulin was secured to the ground with "sand snakes" (a tubular type vinyl about 6" to 8" around which is filled with wet sand).
8. Evergreen did not completely seal the tarpaulin envelope during the fumigating process. Two openings were left in the tarpaulin, one along a seam where two tarpaulins were joined together and another at the base of the tarpaulin, which were large enough to allow gas to be discharged or spilled outside the treated area.
9. The label for Methyl Bromide contained the following direction: "Soak soil with water one foot from edge of the envelope to a depth of six inches."
10. Methyl Bromide is almost insoluble in water and the purpose of soaking the soil around the edges of the envelope is to keep the gas from escaping through air holes in the soil to the outside of the envelope and also to protect plant roots in the area.

11. Evergreen did not soak the soil with water one foot from the edge of the envelope to a depth of six inches.

12. The label for Methyl Bromide contained the following direction: "Make sure...the area [is] posted."

13. Evergreen did not post the area with signs.

14. The label for Methyl Bromide contained the following direction: "Always have an assistant and proper equipment when using fumigant to aid in case of accidents."

15. "Proper equipment" includes at a minimum a halide gas detector, which measures the concentration of Methyl Bromide, and a gas mask.

16. Evergreen did not have a halide gas detector or a gas mask at the fumigation site at all times while the fumigation was being done.

17. By reason of Evergreen's failure to comply with the directions for use on the label, as found above, Evergreen has used the registered pesticide in a manner inconsistent with its labeling, in violation of FIFRA Section 12(a)(2)(G).

18. Giving consideration to the gravity of the violations, the size of Evergreen's business and the effect of the proposed penalty on Evergreen's ability to continue in business, it is determined that a civil penalty in the amount of $1,800 is appropriate.

Discussion and Conclusions

The imposition of civil penalties for violations of FIFRA is governed by Section 14(a) of the Act, which provides in pertinent part as follows:

> "(1) In General.--Any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.
>
> "(2) Private Applicator.--Any private applicator or other person not included in paragraph (1) who violates any provision of this Act subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty by the Administrator of not more than $1,000 for each offense."

Evergreen is Subject to Penalties under Section 14(a)(1) as a Distributor of Pesticides

Evergreen at the outset raises a jurisdictional objection to these proceedings. It contends that it is not a registrant, commercial applicator, wholesaler, dealer, retailer or other distributor included in Section 14(a)(1),[2/] and that Section 14(a)(2) consequently governs the proceedings against it. Under Section 14(a)(2), Evergreen cannot be assessed civil penalties without first having received a written warning or a citation for a prior violation, and it has received neither.[3/]

2/ Evergreen argues that it might be considered a commercial applicator except that the term is limited to one who has been certified under Section 4 of FIFRA to use pesticides classified for restricted use, FIFRA, Section 2(e). There was no provision for certification of applicators in effect in California at the time of the misuse complained of.

3/ It would also follow that under Section 14(a)(2), Evergreen would be subject to much lighter penalties.

EPA contends that Evergreen is a distributor of pesticides within the meaning of Section 14(a)(1), since it supplies the pesticide which it uses in its fumigating operations.

The word "distributor" is not defined in FIFRA. In ordinary usage it means one who "distributes", which commonly means to deal out or spread out units among a number of recipients, with no particular manner of distribution being specified.[4/] Evergreen's position, however, is that as used in FIFRA, "distributor" means specifically one who commercially deals in pesticides by selling them. Evergreen asserts that it did not sell Methyl Bromide but only used it in the sale of a service. In aid of its argument that it did not sell pesticides, Evergreen relies on the fact that it paid no local sales tax on the use of the Methyl Bromide and it also cites decisions of state courts which would arguably support Evergreen's position, if this were a case where Evergreen was being charged with the sale of defective merchandise.[5/]

4/ See e.g., Webster's New World Dictionary of the American Language (College Edition).

5/ See e.g., Aced v. Hobbs-Sesack Plumbing Co., 360 P. 2d 897 (Cal. 1961).

Evergreen also appears to rely on the fact that it performed the fumigation as a subcontractor for Western Exterminating Co., rather than dealing directly with the owner of the home. This would seem to be immaterial in determining whether there has actually been a sale of the pesticide.

The terms "registrant, commercial applicator, wholesaler, dealer, retailer" which precede "other distributor" all refer to persons who are generally in the business of supplying or applying pesticides. It seems obvious that the term "other distributor" was added to make clear that the preceding terms were not intended to be a complete listing of the types of commercial distribution of pesticides which were to be subject to Section 14(a)(1).

The fumigation performed by Evergreen using a pesticide purchased by it was in substance a commercial distribution of a pesticide. It would not be accurate to say, as Evergreen does, that furnishing the pesticide was simply "incidental" to the rendition of the service of applying it. Evergreen's services were utilized because the fumigant was hazardous and must be handled with care, but it was the pesticide itself which accomplished the destruction of the pests. It may be true, as Evergreen argues, that under state law the fumigation may not be considered a "sale" of a pesticide so as to give rise, for example, to an implied warranty of merchantability. 6/ But state law is not controlling in construing a federal statute, unless it is expressly made so by the statute. NLRB v. Hearst Publications, Inc., 322 U.S. 111, 123-24 (1944). Instead, construction is determined by reference to the purpose of the legislation, and the statute should be interpreted so as to effectuate those purposes, if possible, Id.

6/ See e.g., Aced v. Hobbs-Sesack Plumbing Co., supra.

Section 14 of FIFRA was added by the Federal Environment Pesticide Control Act of 1972, Pub. L. No. 92-516, 86 Stat 973 (1972) ("1972 Act"), which completely rewrote FIFRA as it then existed. The purpose of the 1972 Act was "to change FIFRA from a labeling law into a comprehensive regulatory statute that will henceforth more carefully control the manufacture, distribution and use of pesticides." H.R. Rep. No. 92-511, 92d Cong. 1st Sess. 1 (1971). Section 14, providing for the first time for civil penalties was considered a necessary part of the regulatory program. Id. at 25.

An explanation for Congress' reasons in Section 14, for subjecting some persons to more stringent sanctions than others is found in a supplemental report of the Senate Committee on Agriculture and Forestry on H.R. 10729, the bill which subsequently became the 1972 Act. The report stated, S. Rep. No. 92-838 (Part II) 92d Cong., 2d Sess. 23 (1972):

> "The amendment [to Section 14] of the Committee on Agriculture and Forestry provided for an orderly progression of penalties based on the seriousness of the offense. Thus, starting with the ordinary householder, private applicator, farmer, or other person not in the pesticide business committing an offense not deemed suitable for criminal prosecution the Committee on Agriculture provided for a maximum civil penalty of $1,000. For an offense by such a person deemed serious enough for criminal prosecution the maximum penalty would be $1,000 plus imprisonment for 30 days. The Committee on Agriculture and Forestry felt that an offense by a registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor should be treated more seriously than an offense by a householder. A registrant, for example, should have greater knowledge of the dangers of pesticides and greater familiarity with the law regulating their use. A violation by a registrant would be much more likely to have widespread and serious effects than a violation by a householder, home gardener,

> or farmer. Consequently, the amendment of the Committee on Agriculture and Forestry prescribed a civil penalty of not more than $5,000 for an offense by a person in the business of making, selling, or applying pesticides. An offense by such a person serious enough for criminal prosecution would be subject to a fine of up to $25,000 and imprisonment for up to 1 year."

Section 14(a)(2) with its less rigorous enforcement provisions was thus intended to apply only to persons not in the pesticide business, which would not be true of Evergreen. Violations by persons not in the pesticide business were regarded as less serious than violations by persons in the pesticide business. While the report discussed specifically the difference in penalties, the reasoning applies with equal force to the fact that persons in the pesticide business are held to a stricter standard of care than persons not in the pesticide business, and can be assessed civil penalties without first having been given a written warning or a citation for a prior violation.

Evergreen argues that subjecting it to liability under Section 14(a)(1) is contrary to Congress' intention in expressly providing that the provision for certification of applicators in amended FIFRA shall not become effective until five years after the date of enactment of the 1972 Act (i.e., until October 21, 1977). See Section 4(c)(4) of Pub. L. 92-516, as amended by Pub. L. 94-140, appended as a footnote to 7 U.S.C. 136a (Supp. V, 1975). It claims that by so doing Congress intended not to hold people with inferior training to the same level of exposure for civil penalties as those

people who proved their expertise in complying with federal standards by becoming certified commercial applicators.

This argument ignores the distribution aspects of Evergreen's operations. As heretofore found, Evergreen supplies the pesticide as well as applies it. More specifically, Evergreen usually does its fumigation with the pesticides Vikane or Methyl Bromide, and purchases them in sufficient quantities to have a stock on hand to meet its daily requirements (Tr. 201).[7/] There is, therefore, in a real sense, a widespread distribution of pesticides by Evergreen. Given the stated Congressional purpose of generally subjecting persons in the pesticide business to the more rigorous enforcement provisions of Section 14(a)(1), it is more in accord with that purpose to construe narrowly any exemption of a person in the pesticide business from that Section.

Evergreen argues that the words "other distributor" as used in Section 14(a)(1) are necessarily limited by the preceding terms "wholesaler, dealer, retailer" to those who sell only in the same manner as those persons customarily do. The rule of "ejusdem generis"

7/ Reference is to the transcript of the hearing.

is a useful cannon of construction, but it should not be used to defeat the legislative purpose. United States v. Alpers, 338 U.S. 680, 682-83 (1950). Here, subjecting Evergreen to liability under Section 14(a)(1) is in accordance with the purpose of the statute.

Accordingly, I found that Evergreen is a distributor subject to liability under Section 14(a)(1).

The conclusion that Evergreen is a distributor is also supported by Pesticide Enforcement Policy Statement ("PEPS") No. 6, issued by the Environmental Protection Agency on December 17, 1976, 41 Fed. Reg. 55932 (December 23, 1976). In construing a statute, it is appropriate to consider how it has been interpreted by the agency charged with enforcing it. See American Meat Institute v. EPA, 526 F. 2d 442, 450 (7th Cir 1973); In re Evergreen Helicopters, Inc., I.F.& R. Docket No. IV - 214c (EPA) (June 10, 1976); Cf. Skidmore v. Swift & Co., 323 U.S. 134, 140 (1940). PEPS No. 6 deals with the EPA's enforcement policy with respect to the use by professional structural pest control operators of service containers to transport and temporarily store pesticides prior to applying them.[8/] The statement considered specifically the applicability to structural pest control operations of the following provisions of FIFRA: Section 3(a), which

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8/ The enforcement policy statement does not explicitly define the term "structural pest control operator" but the discussion in the statement leaves no doubt that the term includes professional fumigators such as Evergreen, who apply pesticides to buildings and other structures. The application of pesticides to crops or on land, is considered by the EPA as non-structural use. See Pesticide Enforcement Policy Statement No. 5, 41 Fed. Reg. 41142 (Sep 21, 1976).

provides that no person may "distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver" an unregistered pesticide to another person; Section 8(b) making the books and records of any "producer, distributor, carrier, dealer or any other person who sells or offers for sale, delivers or offers for delivery" any pesticide, subject to inspection by the EPA; Section 9(a) authorizing the EPA to enter and inspect any establishment or other place where pesticides "are held for distribution or sale"; and Section 12(a)(1) making it unlawful for any person "to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver" to any person any pesticide which is unregistered or adulterated or misbranded or which, or the claims for which, do not comply with FIFRA in other respects.[9/]

In PEPS No. 6, the EPA took the position that professional structural pest control operators who supply and apply pesticides for hire engage in the distribution or sale of pesticides within the meaning of FIFRA, 41 Fed. Reg. at 55932-933. Accordingly, it was stated that their books and records and their premises where they store pesticides are subject to inspection pursuant to Sections 8(b)

9/ Unlike Section 12(a)(1), the prohibitions in Section 12(a)(2) including the prohibition in Section 12(a)(2)(G) against misusing pesticides, apply to any person.

and 9(a), and that they are subject to the prohibitions of Section 12(a) in their use of the service containers to store or transport pesticides prior to application.

PEPS No. 6 is significant because it is a reminder that Section 14 must be interpreted in the context of the entire statute. See United States v. American Trucking Association, 310 U.S. 534, 542-43 (1940). Who is a distributor within the meaning of FIFRA cannot be determined solely by reference to the prohibitions against misusing pesticides. Other consequences also flow from whether a person is a distributor or not. The conclusion that Evergreen is a distributor in judging its liability for misuse of a pesticide, is also consistent with the EPA's interpretation of other provisions of FIFRA regulating the sale and distribution of pesticides.

The California Cooperative Agreement

Another jurisdictional argument made by Evergreen is based on a "cooperative agreement" between two agencies of the State of California[9a/] and Region IX of the EPA, which was in effect at the time of the misuse complained of and when the complaint was issued. The purpose of the agreement was "to ensure a unified and coordinated program of pesticide episode reporting, investigation, and enforcement action in the State of California. Evergreen Exhibit 4. A "pesticide episode" was defined as "any event which involves

9a/ The Department of Food and Agriculture and The California Agricultural Commissioners' Association.

potential or actual injury, damage, harm, or loss resulting from the use or presence of a pesticide."

Paragraph I of the agreement set forth the legal authority of the parties to make such an agreement. The authority cited for the EPA was FIFRA, Section 14, which, it was stated, "provides for written warnings and for civil and criminal penalties for violations of...FIFRA", and Section 23(a)(1) authorizing the EPA to enter into cooperative agreements with states in the enforcement of FIFRA. The authority cited for the State and County were Division 6, Ch. 4, and Division 7, Ch. 2 of the California Food and Agricultural Code.

Paragraphs II, III and IV set out procedures for exchanging information between the parties about pesticide episodes and coordinating the investigation of episodes.[10/] Paragraph V dealt with enforcement, and Evergreen relies upon the following portion:

> "A. Nothing in this agreement shall preclude State and/or County from undertaking any enforcement action with respect to any act which constitutes a violation of State law. Any enforcement action which may be undertaken by EPA as set forth below will be coordinated with and will complement any enforcement action which may be undertaken by State and/or County.
>
> "B. Civil action under FIFRA shall be undertaken by EPA only when the alleged violator has previously been issued a written warning by EPA. EPA shall discuss with the State Coordinator and County involved, the appropriativeness of initiating such civil action against pesticide users alleged to be in violation of Section 12(a)(2)(g) of FIFRA.

10/ In this case, an initial preliminary investigation was made by the State and a supplementary investigation was then made by the EPA. Tr. 49-73, 99-100.

"C. Written warnings will normally be issued by EPA only as a result of high level episode investigations conducted by any of the parties to this agreement." 11/

Paragraph VI provides for a joint evaluation by the parties of the episode follow-up programs, and Paragraph VII provides for a review of the implementations agreement at the 1976 annual meeting of the California Agricultural Commissioners' Association. Paragraph VIII provides that the agreement was to continue in effect until October 21, 1976, unless modified by mutual consent of the parties or terminated by any party upon a thirty-day advance written notice to the other party.

Evergreen contends that this agreement establishes a jurisdictional prerequisite to civil penalty suits by the EPA for misusing pesticides in violation of Section 12(a)(2)(G), namely, that they may be instituted against a person only if the person has been issued a prior written warning. It is undisputed that Evergreen was not issued a prior written warning.

Evergreen would give the cooperative agreement a greater effect than is warranted from the nature of the agreement. The agreement is termed a "cooperative agreement". No remedies or sanctions are provided for nonperformance. It appears, therefore, that compliance with the

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11/ A "high level episode" is defined according to its effects on humans or the environment, or according to the estimated economic loss it causes, or as a violation resulting in action against a state applicator license, or a violation or injury in an EPA experimental use permit. Evergreen Ex. 4.

Evergreen contends that this was a "low level" episode. The Cooperative Agreement does not specify who determines whether the episode is high or low level. The EPA obviously considered the incident serious enough to merit making its own investigation of the incident and bringing this civil penalty action.

agreement was to depend solely upon the voluntary cooperation of the parties. Further, it is unlikely that some flexibility was not intended in carrying out the agreement, which would be a matter to be worked out between the parties. In fact, the agreement expressly provides that the parties would review the implementation of the agreement. To accept Evergreen's argument, however, would be to assume that the parties intended to vest enforcement rights in third parties which could not be waived except either by terminating the agreement or presumably obtaining the consent of the third party affected. It would also require making the assumption that the EPA intended to weaken enforcement by binding itself to give prior warnings to violators when it was not required to do so under FIFRA. Such assumptions should not be made in the absence of a much stronger showing of the intention of the parties than is manifested by this agreement.

Evergreen claims that it is a third party beneficiary of the contract. As already found, the agreement was not intended to create any enforceable rights. Assuming, arguendo, that it did, Evergreen's rights as a third party, if any, would presumably be determined by California law. Evergreen would not appear to have any enforceable right against the EPA under California law. An analogy may be found in those agreements in which a promisor contracts with a state or municipality to do an act or render a service to members of the public. The law in California is that the promise in itself does not create an enforceable right in the members of the public who are to receive the benefit. There must be

evidence either in the agreement or in the circumstances surrounding its formation that the contracting parties specifically intended that, in addition to their own enforcement rights, enforcement could also be directly obtained by the third parties. See Martinez v. Socoma Companies, Inc. 521 P. 2d 841 (Cal. 1974). Here we have the promise but no evidence that members of the public were to have any enforceable rights against the promisor. In short, if Evergreen did consider the bringing of this action to be in violation of the cooperative agreement, it should have sought redress if it was entitled to redress under the agreement, through the State or County, instead of attempting to enforce the agreement directly by raising its asserted breach as a defense to this proceeding.

Columbia Broadcasting System v. United States, 316 U.S. 407 (1942), and Vitarelli v. Seaton, 359 U.S. 535 (1959), on which Evergreen relies, are not in point because those cases involved an agency's duty to follow its rules or regulations. The cooperative agreement was not intended to be a rule or regulation but a working arrangement between EPA and the State. Unlike an agency rule or statement of general policy, it was not published in the Federal Register. (Tr. 15).

It is accordingly unnecessary for me to decide whether the EPA's institution of this civil penalty action against Evergreen was or was not a breach of the cooperative agreement, since the agreement does not establish any jurisdictional prerequisites to civil penalty suits.

The Violations and the Penalty

Four violations by Evergreen of the label directions were charged: (1) failing to soak the soil with water; (2) discharging the gas outside the areas confined for treatment; (3) failing to post the area with warning signs; and (4) failing to have proper equipment at the application site to aid in the case of accidents.

1. Failing to soak the soil with water.

The directions on the label of the Methyl Bromide for preparing for fumigation included the following statement: "Soak soil with water one foot from the edge of the envelope to a depth of 6 inches." EPA. Ex. 2. It is undisputed that Evergreen did not soak the soil around the edge of the envelope with water as directed by the label. Methyl Bromide is almost insoluble in water and the purpose of soaking the soil around the edges of the envelope is to keep the gas from escaping through air holes in the soil to the outside of the envelope and also to protect plant roots in the area. Tr. 145.

Evergreen introduced evidence to show that it is the custom and usage in the fumigation industry not to soak the soil except where there is plant life to be protected. See Tr. 172. This would not be the answer to Evergreen's failure to soak the ground since there was plant life in the area to be protected. See Tr. 83-85. In any event, custom and usage in the industry are no excuse for not complying with the label's express instructions.[12/]

12/ See infra at 26-27.

In determining the appropriate penalty, I must consider the gravity of the violation. FIFRA, Section 14(a)(3). The gravity of the violation has been held to involve an evaluation of two factors, gravity of harm and gravity of misconduct. Amvac Chemical Corp., EPA Notice of Judgment (June 1975) No. 1499 at 986. The gravity of harm here is not in actual harm but in the danger of harm caused by not using a highly toxic pesticide properly. The gravity of misconduct is measured by the fact that the label direction was simply not followed. I find that the penalty of $300 requested by EPA is an appropriate penalty.

2. Discharging the gas outside the area for treatment.

A brief summary of the evidence is helpful in considering this violation.

The gas was injected into the house at 877 Marin Drive by Evergreen's employees Carbone and Ferguson at about 1:30 p.m. on December 22, 1975. EPA Ex. 5. Ferguson then left and Carbone stayed at the location. About 2 hours later Lieutenant Brent Schacherl of the Tamalpais Fire Protection District arrived at the area to answer an emergency call from the occupants of the house located at 879 Marin Drive which was next door to and east of 877 Marin Drive. The house at 879 Marin Drive was occupied at that time by a Mrs. Gibbs, her mother, and two daughters, one three years old and one six months old. The two daughters had been suddenly taken ill from what appeared to be exposure to a gas.[13/] Lt. Schacherl with Mr. Carbone inspected the

13/ The symptoms suffered by the Gibbs' children and by those who inspected the house at the time indicated exposure to Methyl Bromide or Chloropicrin. Tr. 110, 163, 179.

the tarpaulin envelope over 877 Marin Drive. A hole was discovered in the seam where two tarpaulins were joined together, about two feet to three feet up from the ground, and big enough so that Lt. Schacherl could put his hand through sideways. Tr. 112, 180. Nearby was another opening where the tarpaulin did not reach the ground. Tr. 112. Although both openings were apparently small, they were of sufficient size to allow gas to escape.[14/]

The misuse at issue here is the spilling or discharging of Methyl Bromide fumigant outside the area confined for treatment, contrary to the directions on the label. That the purpose of the tarpaulin envelope was to restrict the gas to the treated area has not been questioned. The issue has been whether the tarpaulin envelope was airtight as it should have been, and subsidiary to that, the question of whether the gas escaping from the opening in the tarpaulin envelope did not make the Gibbs' children ill.[15/]

14/ Lt. Schacherl estimated that the opening in the seam was about 3 feet long and that the opening at the base was probably 3 feet to 4 feet long. Tr. 112. He did not further elaborate on the size of the opening in the base, and I find that the gap created was roughly about the same size as that created by the opening in the seam, i.e., large enough to put a hand through sideways.

15/ In its reply brief, EPA argues for the first time that it is immaterial how the gas migrated from 877 Marin Drive to the Gibbs' home, whether by an opening in the tarpaulin or, as Evergreen suggests, by some other means such as an old sewer line. The position that EPA took in its submission of January 17, 1977, to my request for a prehearing exchange of information was that it was relying on evidence establishing the openings in the tarpaulin to support this charge of misuse. This was also the tenor of its proof at the hearing. The claim that Evergreen should now be held liable regardless of what caused the escape of gas is a change of position which raises entirely new questions and comes too late to be considered.

Turning to the question of whether Evergreen was guilty of a misuse because the tarpaulin was not completely sealed during the fumigation, I find that it was. Nothing in the record indicates that the tarpaulin envelope can not be completely sealed and will not stay sealed during fumigation when it is properly put on a structure by a professional fumigator using the necessary care. Evergreen has not disputed what would seem obvious anyway; that what was intended as compliance with the label directions was a tarpaulin envelope that would be airtight during fumigation. Nor has Evergreen asserted that the residence at 877 Marin Drive presented any unusual conditions in applying the tarpaulin envelope which should be considered in determining its compliance.

The conclusion necessarily follows that the openings in the tarpaulin were caused by the failure of Evergreen's employees to properly put on the tarpaulin envelope.[16/] Since this case deals with the application of a highly toxic gas (see Tr. 158-59), the failure of the applicator to carry out label directions properly is a use of the pesticide in a manner inconsistent with its labeling in violation of Section 12(a)(2)(G).

16/ Carbone testified that he inspected the tarpaulin envelope after injecting the gas and found no openings. Tr. 177. The thoroughness of his inspection, however, is open to question since the evidence indicates that the openings were in the tarpaulin long enough so that by the time they were discovered, a considerable quantity of gas had leaked out. Lt. Schacherl and Carbone detected no presence of Methyl Bromide or Chloropicrin when they inspected the holes. Tr. 127-28, 180-81.

In determining the gravity of misconduct, however, I do not overlook the substantial effort that Evergreen did make to seal the premises, as attested to by the fact that what is involved are two small openings in the entire tarpaulin. Under the circumstances, I cannot find that Evergreen was guilty of gross misconduct, although at the same time, because it was dealing with a highly toxic gas, I find that more than slight misconduct was involved.

As to the gravity of the harm, a good deal of the evidence in this case dealt with the question of whether the gas escaping from the openings harmed the Gibbs' family. It is EPA's position that the illness of the Gibbs' children was caused by Methyl Bromide escaping from the openings, and, since it is heavier than air, dropping down the slope that lay between the tarpaulin where the holes were located, and the opposing basement wall of the Gibbs' home 30 feet away, infiltrating the Gibbs' basement through vents in the wall, and then being drawn down into the furnace by the blower and dispersed through the house through the heating ducts. Theoretically, this may have been possible given the physical properties of Methyl Bromide and Chloropicrin. Tr. 144. The evidence is insufficient for me to find that it is more than a hypothesis and that it does explain what actually occured. The evidence does not rule out the possibility that the gas simply dispersed into the air without harming anyone.[17/] There is also

17/ This is apparently what happened when the tarpaulin was lifted after the opening was discovered. See Tr. 130, 203-04.

evidence indicating that if Methyl Bromide did infiltrate the Gibbs' house, it was from another source such as an unknown pipe in the basement connecting the two houses. Tr. 204-06; Evergreen Ex. 11. 18/

Consequently, I find that while the leak created a risk of harm, there has been no showing that it actually caused harm. Because the fumigant is highly dangerous, however, I still find the gravity of the harm to be great.

Taking into account the gravity of misconduct and the gravity of the harm, I find that the appropriate penalty is $500.

3. The failure to post warning signs.

The instructions for handling on the label specified that the applicator should make sure that the area is posted with signs. 19/ The only dispute on this issue is whether, in fact, such signs were posted. Lt. Schacherl testified that on his inspection of the tarpaulin cover he saw no signs. Tr. 130-131. Carbone testified, on the other hand, that he posted the signs after the injection of the Methyl Bromide. Tr. 176. In an affidavit which he had given previously to the EPA, however, he stated that he was not sure that he had posted signs. EPA Ex. 9.

18/ EPA argues that the affidavit given by Ron Bauer (Evergreen Ex. 11) suggesting on the basis of a second fumigation done at 877 Marin Drive, that the leakage into the Gibbs' home was caused by an open pipe between the two structures, should be given no weight because Evergeen did not inform EPA of the second fumigation until the hearing itself. Mr. Bauer was present at the hearing and was prepared to testify but EPA did not take advantage of this. Tr. 213. Accordingly, the affidavit is entitled to weight since it is unrebutted and there is nothing in its contents to indicate that it should not be given credence.

19/ EPA Ex. 7 is a sample of a warning sign. Tr. 195.

Lt. Schacherl was making an investigation in the performance of his duties as a member of the Tamalpais Fire Protection District, and in response to an emergency call that had been received from the Gibbs' family. Tr. 79-81. He had no interest in the matter other than to perform his duties. On the other hand, Carbone's testimony is weakened by his prior affidavit and by the fact that since he is currently employed as a structural control operator (Tr. 172) he may have an interest in exonerating himself from any breach of his duties.[20/]

I find accordingly that Evergreen failed to post warning signs as required by the label and that this was a misuse in violation of Section 12(a)(2)(G). I also find that the gravity of harm, which in this case is the risk created by not giving warning of the presence of a highly toxic gas, and the gravity of misconduct in failing to post the signs, justify the penalty of $300 requested by the EPA.

20/ Mr. Peter Matson of Western Exterminators who arrived on the scene about one-half hour to forty-five minutes after Lt. Schacherl, testified that he inspected the tarpaulin cover and saw signs on it. Tr. 203. He did not know when the signs were put up and his testimony does not exclude the possibility that this could have been done just before his arrival. See Tr. 208-9. It is to be noted that Mr. Matson also did not see any openings in the tarpaulin. Tr. 203. Nevertheless, both Lt. Schacherl and Carbone were in agreement there was at least one opening when they inspected the tarpaulin. See Tr. 180.

4. The failure to have proper equipment at the application site to aid in the case of accidents.[21/]

The handling precautions in the label specified, "Always have an assistant and proper equipment when using fumigant to aid in the case of accidents." EPA Ex. 2.

The facts as to this violation are undisputed. Carbone was assisted by Ferguson, another Evergreen employee, in getting the site ready for fumigation. They had with them, among other equipment, a halide gas detector, which shows whether Methyl Bromide is present in harmful concentrations, and a gas mask. After the gas was injected, Ferguson drove away in Evergreen's truck, taking with him the halide detector and the gas mask, leaving Carbone at the fumigation site without any safety equipment during the exposure period. Tr. 176, 187; EPA Ex. 6.

Evergreen does not question that it should have a halide gas detector and a gas mask on hand at the fumigation site when the gas is injected at the beginning of the fumigation period, and when the tarpaulin is removed at the end. At issue is the legal consequences of its not having proper equipment at the fumigation site during the intervening period. Evergreen justifies its practice on the ground

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21/ The complaint also alleged that Evergreen violated FIFRA in not having an assistant present at the fumigation site at all times. In its post-hearing brief, EPA has asked for penalties only for Evergreen's failure to have proper equipment, and, consequently, this is the only violation I have considered.

that it is the custom and usage in the fumigation industry to have equipment at the fumigation site only when the gas is injected and the tarpaulin is removed.[22/] Industry practice, Evergreen asserts, should be taken into account in determining what uses are prohibited. In support of its position, Evergreen cites the Senate Report on H.R. 10729 (the predecessor bill to the 1972 Act), S. Rep. No. 92-838, 92d Cong. 2d Sess. 16 (1972), in which it was stated that what uses would be prohibited could be left to "the good sense of the Administrator, the manufacturers and the users." In that same Senate Report, it was also made clear that specific label instructions were not to be disregarded. Id.[23/] Here the label specifically directed that proper equipment always be present when the fumigant is being used.

22/ The evidence, however, related only to the industry practice of not having an assistant and halide gas detector at the site during the entire fumigation period. See Tr. 171-72. Evergreen apparently does not attempt to justify not having a gas mask present at all times as being in accord with industry practice, although it does not dispute that a gas mask is equipment which it should have along with the halide gas detector. With respect to safety glasses, Evergreen asserts that the question of whether it should have had them present goes beyond the scope of the complaint. Possibly safety glasses are included among the equipment needed to aid in case of accidents. The complaint is ambiguous on this and since safety glasses were mentioned for the first time in EPA's post-hearing brief, I have not considered them in determining whether there has been a violation and assessing the penalty.

23/ In referring to a "sensible" approach to regulating the use of pesticides, Congress was apparently concerned with the treatment of unspecified uses which did not create any foreseeable danger of harm to the environment or to man. There is no indication that Congress intended to show any deference to industry practice in determining what uses would be harmful. See S. Rep. No. 92-838, 92d Cong. 2d Sess. 16 (1972).

The instructions for use on the registered label play an essential role in the regulatory scheme established by FIFRA to protect persons and the environment.[24] If the industry were permitted to set its own standards on when the label instructions could be disregarded, the effectiveness of the label as a regulator could be largely nullified and the product registration process of FIFRA could be seriously undermined.[25]

Further, I do not see how Evergreen could justify its practice as being "good sense." Accidents may occur at any time from when the gas is injected to when the tarpaulin is lifted. The incident at the Gibbs' house is a dramatic illustration of why at least proper equipment should be at the fumigation site at all times. The evidence indicates that Methyl Bromide may have in some way infiltrated the Gibbs' home. Supra. If a halide gas detector had been on hand, the presence of Methyl Bromide and its concentration could have been positively identified, so as to avoid any possibly fatal mistake on what treatment should be given to the victims.[26] Without a gas mask, Carbone was

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24/ See S. Rep. No. 92-838, 92d Cong. 2d Sess. 21 (1972), wherein it was stated that the provision requiring compliance with the label is one of the "key new authorities" of the bill for protecting persons and the environment.

25/ If certain conditions warrant dispensing with a direction on the label of a pesticide, the proper approach would be to seek to have the label revised accordingly. If there was any doubt about the interpretation of the label, recourse might also be had to obtaining advice from the Agency. See e.g., the EPA's Implementation Plan for the 1972 Act, 38 Fed. Reg. 1142, 1144 (Jan. 9, 1973).

26/ The doctor who was summoned to treat the Gibbs' family diagnosed them as probably suffering from mild carbon monoxide poisoning. Evergreen Ex. 5. In a subsequent affidavit, he stated that he was unfamiliar with the symptoms of Methyl Bromide poisoning at the time. EPA Ex. 13.

exposing himself to the danger of possible Methyl Bromide poisoning on entering the Gibbs' home, and he could not have given any assistance in places where there was a heavy concentration of gas, such as, for example, in the basement. See Tr. 110.

I find accordingly that the failure of Evergreen to have a halide gas detector and gas mask present at the fumigation during the entire fumigation period was a use of the pesticide in a manner inconsistent with its labeling in violation of Section 12(a)(2)(G).

EPA has proposed a penalty of $700 for this violation based on the Guidelines for the Assessment of Civil Penalties, 39 Fed. Reg. 27711 (Jul 31, 1974). The computation was made on the fact that Evergreen's gross sales for the prior fiscal year were in Category II ($100,000 - $400,000),[27/] and on the violation being a use violation where the adverse effects are unknown (Charge Code E28). See 39 Fed. Reg. at 27716. I may consult and rely on the Guidelines for Assessment of Civil Penalties although I am not bound by them and may increase or decrease the amount. 40 C.F.R. Section 168.46(b). Giving consideration to the gravity of misconduct and gravity of harm, both of which I find to be great here, I find that a penalty of $700 is appropriate, even though the violation is based entirely on Evergreen's failure to have a gas mask and a halide gas detector at the fumigation site at all times, and without consideration of not also having safety glasses present.

27/ This was admitted by Evergreen in its statement furnished pursuant to a prehearing exchange of information between the parties.

Evergreen is Liable for a Violation of FIFRA

Committed by its Employees

Evergreen contends that Merl Walker, the owner of Evergreen, should not be held liable for the acts of his employees because he did not personally do the fumigation.

FIFRA Section 14(b)(4) provides as follows:

> When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any person shall in every case be also deemed to be the act, omission or failure of such person as well as that of the person employed.

Section 14(b) is headed "Criminal Penalties" and Evergreen would apparently construe Section 14(b)(4) as limited only to criminal actions. The same argument was rejected by the late Administrative Law Judge Levinson in the case of Evergreen Helicopters, Inc., I.F. & R. Docket No. IV-214C (Order Denying Respondent's Motion for Accelerated Decision, issued June 10, 1977). Judge Levinson stated, Id. at 8:

> Section 14(b)(4), by its terms, is not limited to criminal actions. The opening phrase of this section clearly states that it shall apply "when construing and enforcing the provisions of this Act...." [Emphasis supplied]. It is to be noted that the word "Act" is used and not the word "section."

Judge Levinson went on to say, Id. at 11:

> It is apparent from the legislative history of the Act that Congress intended the same principles to be applied in determining the responsibility of an employer whether the proceedings were criminal or civil. In several committee reports 28/ with regard to sections 14(a) and (b) the following statements appear:

28/ Judge Levinson's footnote: House Committee on Agriculture, H.R. Rep. No. 92-511, 92d Cong., 1st Sess. (1971), p. 25; Senate Committee on Agriculture and Forestry, S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), p. 27; Senate Committee on Commerce, S. Rep. No. 92-970, 92d Cong., 2d Sess. (1972), p. 40.

> Civil penalty provisions are considered a necessary part of a regulatory program such as pesticides control. While the criminal provisions may be used where circumstances warrant, the flexibility of having civil remedies available provides an appropriate means of enforcement without subjecting a person to criminal sanctions.
>
> The flexibility contemplated by Congress could not be achieved if the principle of respondeat superior did not apply in civil penalty actions.

Evergreen argues that the doctrine of "respondeat superior" is based on the policy of who should bear the financial loss for injuries caused by negligence, which consideration is not present in the enforcement of FIFRA. The doctrine also has its roots in the fact that the employer can determine whom he will hire and can exercise control over his employee. See Restatement (Second) of Agency, Section 219, comment (a) at 483. Here the actions of Evergreen employees in not soaking the soil and in not having proper equipment to aid in the case of accidents with them at all times were done with Evergreen's consent and approval.

In the enforcement of statutes, there is also the policy that the one in whose name the action has been taken and who profits from it should bear responsibility for violations caused by the action. See Goodman v. FTC, 244 F. 2d 584, 590-93 (9th Cir. 1957).

The question here is what Congress intended as necessary for effective enforcement of FIFRA. Evergreen's argument for limiting vicarious liability to knowing violations by an employee, is that in such cases the employer was likely to have been guilty of hiring the wrong

caliber of employee or carelessly supervising his conduct. But this can also be true of the employer where the employee was remiss or careless in carrying out his duties, and where the consequences of the violation can be equally as serious as the criminal violation.

It is accordingly concluded that Evergreen, under Section 14, is liable for the violations found.

The Affidavits and Reports Were Properly Admitted Into Evidence

During the course of its investigation, the EPA obtained affidavits from Mrs. Janet Gibbs, who, with her children and mother, were exposed to what appeared to be Methyl Bromide and Chloropicrin in their home on the day of the fumigation; from Kenneth Hawley, a district supervisor for Pacific Gas and Electric Co., who, in response to a call, inspected the furnace and water heater in the Gibbs' home to determine if they were leaking gas; and from Dr. David Ehrenfeld, who treated the Gibbs' children at the Marin General Hospital to which they were taken. Tr. 60-67. EPA Ex. 11-13. These persons, however, refused to attend the hearing. Tr. 107-108. There is no provision in FIFRA for compelling the attendance of these witnesses, so they could not be made available for cross-examination. Also obtained in the investigation were the official reports of the Tamalpais Fire Protection District made on December 22, 1975 (Tr. 116, 119; EPA Ex. 3), and the report of the Marin County Sheriff's Office made by the then Deputy Officer who was present at the fumigation site on December 22, 1975 (Tr. 37, EPA Ex. 4). The Deputy Officer also refused to attend the hearing. Tr. 108. Lt. Schacherl, who participated in making out the Tamalpais Fire Protection District report, did, however, appear and testify. These documents were admitted into evidence over Evergreen's objection.

Contrary to Evergreen's claim, the introduction of this hearsay evidence was not inconsistent with Section 168.41 of the rules, 40 C.F.R. Section 168.41. See my memorandum and order in this case issued on May 10, 1977. I also stated in that ruling that the admissibility of hearsay was to be distinguished from the probative value which may be attributed to it.

These affidavits and reports related to the question of whether or not the openings in the tarpaulins caused harm to the Gibbs' family. They were properly admissible and entitled to some weight because they contained relevant information by eyewitnesses, which, in the case of the affidavits and the Marin County Sheriff's report, could not be acquired in any other way.[29/] The facts stated in them corroborated in some respects the testimony of Lt. Schacherl, and that was the only reliance I placed on them. Such use of hearsay is entirely proper. See School Bd. of Broward County, Fla. v. HEW, 525 F. 2d 900, 905 (5th Cir. 1976); Jacobwitz v. United States, 424 F. 2d 555 (Ct. Cl. 1970); Mackatunas v. Finch, 301 F. Supp. 1289, 1291 (E.D. Pa. 1969).

29/ The Tamalpais Fire Protection District Report would apparently have been independently admissible even under the Federal Rules of Evidence. See Fed. Rules Evid. Rule 803(8), 28 USCA; Bridger v. Union Ry. Co., 355 F. 2d 382, 391-92 (6th Cir. 1966).

Conclusions

It is accordingly concluded that Evergreen has violated Section 12(a)(2)(G) as herein found. Taking into account the gravity of the violations, and the size of Evergreen's business, I conclude that an appropriate penalty is $1,800. Evergreen's business is profitable as shown by the financial statements it submitted in connection with its prehearing exchange of information, and Evergreen stated in that exchange that it did not contend that the imposition of the penalty proposed in the complaint (larger in amount than what has actually been assessed) would adversely affect its ability to continue in business.

FINAL ORDER[30/]

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. Section 136 l(a)(1) (Supp. V, 1975), a civil penalty of $1,800 is assessed against respondent, Evergreen Pest Control for the violations which have been established on the complaint issued on September 13, 1976.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

September 29, 1977

30/ Unless an appeal is taken by the filing of exceptions pursuant to Section 168.51 of the rules of practice, 40 C.F.R. 168.51, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Administrator. See 40 C.F.R. 168.46(c).

ATTACHMENT

Parallel Citations to Sections of FIFRA
in the Statutes at Large and in Title 7, United States Code,
Supp. V (1975)

Statutes at Large	7 U.S.C.
Section 2	Section 136
3	136a
4	136b
5	136c
6	136d
7	136e
8	136f
9	136g
10	136h
11	136i
12	136j
13	136k
14	136 l
Section 15	Section 136m
16	136n
17	136o
18	136p
19	136q
20	136r
21	136s
22	136t
23	136u
24	136v
25	136w
26	136x
27	136y

CERTIFICATION

I hereby certify that the original of this decision, issued by Administrative Law Judge Gerald Harwood, was mailed, regular mail, to the Regional Hearing Clerk, Region IX, and copies were mailed, certified, return receipt requested to the following:

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Patricia T. Galpin
Secretary

September 29, 1977