UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Basin Co-op, Inc. Docket No. IF&R-VIII-93-335C

Respondent

INITIAL DECISION

Dated: February 26, 1997

FIFRA: Pursuant to Section 14 (a) (1) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §1361 (a) (1) , Respondent Basin Co-op, Inc. is assessed a civil penalty of $4000 for selling a restricted use pesticide to an uncertified applicator in violation of FIFRA §12(a)(2)(F), 7 U.S.C. §136j(a)(2)(F).

Appearances:

For Complainant:

Brenda L. Harris, Esq.
U.S. EPA Region 8
Denver, Colorado

For Respondent:

Ted T. Svitavsky, Esq.
Corporon, Hoehn, Svitavsky,
Vaughters & Eyler, L.L.C.
Englewood, Colorado

Proceedings

The Region 8 Office of the United States Environmental Protection Agency (the "Complainant" or "Region") filed a Complaint on June 8, 1993 against Basin Co-op, Inc., of Durango, Colorado (the "Respondent" or "Basin") . The Complaint charged the Respondent with selling a restricted use pesticide to an uncertified applicator, in violation of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") §12 (a) (2) (F) , 7 U.S. C. §136j (a) (2) (F) . Pursuant to FIFRA §14(a), 7 U.S.C. §1361(a), the Complaint seeks assessment of a civil penalty of $5000 against Respondent. In its Answer of June 24, 1993, Basin denied liability for the violation and contested the amount of the proposed civil penalty.

The hearing in this matter was postponed from its original 1995 date on the mutual request of the parties. The undersigned was redesignated the presiding Administrative Law Judge ("ALJ") in this case on December 15, 1995.

The hearing convened before ALJ Andrew S. Pearlstein on March 19, 1996 in Durango, Colorado.

The Region presented four witnesses, and Basin presented three witnesses. The transcript of the hearing consists of 290 pages. Sixteen exhibits were offered for identification by the parties, of which 13 were received into evidence. The parties each submitted post-hearing briefs. The Complainant also filed a reply brief, while Respondent did not. The record closed on July 23, 1996 upon the ALJ's receipt of the Region's reply brief.

FINDINGS OF FACT

The Respondent, Basin Co-op, Inc., operates two retail agricultural supply establishments, and associated storage facilities, in southwestern Colorado. The main store is located at 26103 Highway 160 E, in Durango, and the other is in Arriola, near Cortez, about 50 miles away. Basin is an incorporated cooperative association in which the farmers who patronize the Co-op are members with an equity interest in the business. The Respondent sells such items as seed, fertilizer, fuel, livestock equipment, fencing supplies, and chemical pesticides to its members and customers. (Tr. 245-248[1]). Basin realizes gross revenues of more than one million dollars per year. (Tr. 187).

On February 23, 1993, Henry Bonzek, Jr., an inspector in the Region's FIFRA program, visited Basin's store in Durango to conduct an inspection. Mr. Bonzek

planned this as a routine inspection of dealers of restricted use pesticides ("RUP"), that he conducted on a regular basis, approximately once every two years. In planning his inspections, Mr. Bonzek followed a "Neutral Inspection Plan" developed by Region 8. (Exs. 1, 7, 11; Tr. 15-19, 68).

Upon his arrival at about 2:00 P.M., Mr. Bonzek introduced himself to Basin's General Manager at the time, Russell Kroeger. Mr. Bonzek asked to see Basin's records of sales of RUP. Mr. Kroeger cooperated fully, and showed Mr. Bonzek records of Basin's sales of RUP (Tr. 23-24, 167, 254). The records included a log book of such sales, and copies of invoices with copies of the purchaser's certified applicator card. During the inspection, Respondent had copies made of those records for Mr. Bonzek.

One of the copies recorded a sale of the RUP Tordon to James K. Adkins, of Hesperus, on August 8, 1992. The expiration date of Mr. Adkins' certified applicator card could not be read on the copy. (Ex. 2). Mr. Bonzek checked his computer printout list of certified applicators in Colorado which indicated that Mr. Adkins' certification had expired on July 8, 1991. This expiration date was later confirmed by checking the current records at the EPA office in Denver, and through an interview with Mr. Adkins. (Ex. 6, 10; Tr. 138).

Under FIFRA §ll and CFR §171. 11 (d) , applicators of restricted use pesticides must maintain a current certification in order to lawfully apply or supervise the application of such pesticides. Certifications are granted upon completing an approved training course, a written examination, or a home study course. The courses and examinations may be given by private parties, such as pesticide retailers, approved by EPA. The examination is given in an openbook manner. It is not given on a pass/fail basis, but is continued or repeated until the applicant completes enough of the test satisfactorily. (Tr. 125, 143, 152-153). Certifications are valid for four years and are represented by a card issued by the EPA and, in this case, the State of Colorado. The card includes identification information, the certified applicator's signature, and an expiration date. In order to avoid a lapse in certification, it is necessary to reapply before the expiration date of the applicator's four-year term.

Mr. Adkins had taken the written test at the Basin establishment in 1987, and was issued his certification in Colorado in that year. (Tr. 103, 113). After the Region's inspection of Basin and ensuing investigation that determined his card had expired, Mr. Adkins reapplied for his certification to apply RUP on February 23, 1993. (Ex. 9). He was recertified, effective on March 2, 1993,

with an expiration date of March 2, 1997. (Ex. 10). Thus, Mr. Adkins certification lapsed from July 8, 1991 until March 2, 1993.

Basin was aware of the requirement that restricted use pesticides were only to be sold to currently certified applicators. (Tr. 227, 262). Basin conducted regular training programs for its employees that covered the sales procedures and record-keeping requirements for the retailing of restricted use pesticides. (Tr. 227, 270). If the sales clerk was unsure of the certification status of the purchaser, he or she could, and often did, telephone the EPA's Regional Office in Denver, where the status could be verified. (Tr. 229; 272-273).

On Saturday, August 8, 1992, James K. Adkins entered Respondent's Durango store to buy some Tordon to control knapweed and Russian thistle at his ranch. Wendy Hendricks was the clerk behind the counter at the time. Mr. Adkins presented his private applicator certification card. However, the expiration date was illegible. (Ex. 6, Tr. 93, 228-229) . It was common for the writing on the cards to become rubbed out due to wear and tear. (Tr. 155, 275). After further examination of the card and deliberation, Ms. Hendricks came to the belief that Mr. Adkins' card expired after August 8, 1992. (Tr. 94, 229) . The EPA Regional Office could not be called because it was a Saturday. She then sold him the Tordon. Mr. Adkins was not a certified applicator on that date due to the expiration of his certification.

Mr. Adkins applied the Tordon at his ranch in Hesperus within several days after the sale on August 8, 1992, in order to control knapweed and Russian thistle. (Ex. 6). Mr. Adkins was an experienced pesticide applicator, having been a commercial applicator in California before coming to Colorado and getting certified from 1987 to 1991. He had applied Tordon on one previous occasion. Mr. Adkins properly followed all label directions in his application of Tordon in August 1992. (Tr. 111, 203).

The Region served a Complaint on Mr. Adkins on May 26, 1993 charging him with violating FIFRA §136j (a) (2) (F) by using a RUP while not certified to do so. The Complaint sought assessment of a civil penalty of $5000 against Mr. Adkins. On September 30, 1993, the Region and Mr. Adkins executed a Consent Agreement that completely settled the civil violation alleged in the Complaint. Pursuant to that Consent Agreement and Consent Order, Mr. Adkins paid a civil penalty of $1190. (Ex. 15).

DISCUSSION

Liability

Pursuant to FIFRA §12 (a)(2)(F), 7 U.S.C. §136j(a)(2)(F), it is a violation to distribute or sell a restricted use pesticide for a purpose not in accordance with §136a of FIFRA. That section, at §136a(d)(C), requires that the application of any such pesticide be done only by or under the direct supervision of a certified applicator. It is undisputed here that Respondent sold Tordon, a RUP, to James K. Adkins, who was not a certified applicator at the time, and that he applied the pesticide while he remained uncertified.

It is immaterial, for the purpose of establishing liability, that the exact circumstances of the sale on August 8, 1992, are somewhat in dispute. Ms. Hendricks testified that she did not remember any of her supervisors being present and involved in her examination of the card and ultimate determination that it indicated a date in 1994 (Tr. 229, 236). Mr. Adkins testified that another unidentified man was present behind the counter who tried to look up his certification expiration date, and then decided to sell it to him. He believed at the time that the expiration date was later in 1992. (Ex. 6, Tr. 93-94). It is not unusual for recollections of a transaction such as this to vary more than three years later.

The essential facts remain undisputed that the expiration date on Mr. Adkins' card was not readily legible, and that it had expired in 1991. The copy of the card admitted into evidence does not show anything remotely legible in the space for an expiration date. (Ex. 2). Both Ms. Hendricks' and Mr. Adkins' accounts agree that they had trouble reading the card on August 8, 1992. Yet, the sale was made anyway, on a date during the lapse in Mr. Adkins' certification. The Respondent is therefore liable for a violation of FIFRA §12 (a)(2)(F),7 U.S.C. §136j(a)(2)(F) .

Respondent has argued that the inspection that gave rise to this proceeding was not conducted in accord with a neutral inspection scheme, and that the evidence should therefore be suppressed. However, it is not disputed that the inspection by Mr. Bonzek on February 23, 1993, was with the Respondent's consent (Tr. 23, 167, 254). In addition, the preponderance of the evidence indicates that the inspection was properly within the bounds of a neutral inspection scheme. Basin's Durango store was inspected in turn, approximately once every two years. It was inspected with a frequency commensurate with the amount of its sales of RUP, on the same basis as other RUP dealers in the region (Ex. 11; Tr. 68, 183, 214, 220, 266).

Amount of Civil Penalty

FIFRA §14 (a) (1) , 7 U.S.C. §1361 (a) (1), provides that dealers, retailers, and distributors of pesticides may be assessed a civil penalty of not more than $5000 for each violation. In determining the amount of such civil penalty, FIFRA §14 (a) (4) requires the Administrator to consider "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."

The Region calculated the civil penalty in this case by following the guidelines set forth in the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) , dated July 2, 1990 (the "ERP, " Ex. 14) . The EPA has promulgated penalty policies such as the FIFRA ERP in order to guide the Agency's enforcement staff to assess civil penalties in a consistent and fair manner in administrative proceedings.

The EPA Rules of Practice require the ALJ to consider such civil penalty policies issued under the relevant statute, and to state, specific reasons for deviating from the amount of the penalty recommended in the Complaint. 40 CFR §22.27(b). In effect, the ALJ has discretion to "either approve or reject a penalty suggested by the guidelines," and "to either adopt the rationale of a particular penalty policy where appropriate or to deviate from it where circumstances warrant." In re DIC Americas, Inc., TSCA Appeal No. 94-2, p. 6 (EAB, September 27, 1995).

In this case, the ERP provides an appropriate framework for assessing a penalty. The testimony of the Region's witness on the penalty calculation, Timothy Osag, a Senior Enforcement Coordinator, demonstrated that the Region considered the requisite statutory factors through its application of the ERP guidelines. The Respondent did not substantively challenge the ERP's approach. However, as discussed below, a reduction in the proposed penalty is warranted under the ERP due to the Region's failure to prove one of the factors it relied upon in its assessment -- the existence of a prior violation by Respondent.

The Respondent's violation of selling a RUP to an uncertified applicator for an unauthorized use, prohibited by FIFRA §12 (a) (2) (F), is categorized as a level 2 violation in the ERP. (Ex. 14, p. A - 4) It was undisputed that Basin's gross annual revenues exceeded $1,000,000 and that the payment of the proposed $5000 penalty would have no effect on Respondent's ability to continue in business. (Tr. 188). These two factors place Respondent's violation in the ERP

matrix value for a level 2 violation and a category I size of business, for a base penalty of $5000. (Ex. 14, p. 19-20).

The next step in the ERP calculation is to adjust the base penalty by considering several gravity adjustment criteria relating to the specific facts and circumstances of the subject violation. (Ex. 14, p. 21-22). Those criteria include an assessment of the toxicity of the pesticide involved, the risk of harm to human health and the environment, the Respondent's compliance history, and Respondent's culpability. These factors are assigned numerical values, and the total determines the magnitude of any increase or decrease in the penalty amount, within the statutory maximum. (Ex. 14, p. 21-22).

As applied to the circumstances of Basin's violation, there was essentially no dispute as to the first three gravity adjustment criteria. The pesticide involved, Tordon, is a RUP, which merits a value of two points (Ex. 14, p. B-1; Ex. 13). The Region assessed the risk to human health as minor, with the lowest value of one point. (Ex. 14, p. B-1, Ex. 13). After hearing Mr. Adkins' testimony concerning his experience as a pesticide applicator and the method used to actually apply the Tordon, Mr. Osag reduced the Region's assessment of environmental harm from the median value of three points, to that for minor risk, the lowest value of one point. (Ex. 14, p. B-1; Ex. 13; Tr. 203). The evidence concerning the nature of the certification examination, together with Mr. Adkins' experience as an applicator of RUP, may also be considered to buttress the conclusion that the risk to human health and the environment was minor due to this violation.

- Negligence

The Region determined that Respondent's culpability for this violation was a result of negligence, thus assigning an adjustment value of two points. (Ex. 14, p. B-2; Ex. 13). The preponderance of the evidence supports this assessment.

Although Mr. Adkins' and Ms. Hendricks' recollections of the sale on August 8, 1992 vary somewhat, they agree on the essential fact that the expiration date on Mr. Adkins' card was not readily legible at the time. Respondent made some effort to determine the date, but was unsuccessful. If Mr. Adkins is correct that another employee searched the records, the inability to determine the date of expiration must be ascribed to poor or negligent record-keeping. Respondent is required by 40 CFR §171. 11 (g) (2) (i) (B) to maintain records including the expiration date of the certification of persons sold RUP. Although

Respondent is not charged a violation of that regulation, the evidence shows that the only such record Respondent had was a copy of

Mr. Adkins' illegible certification card. (Ex. 2). If the decision to sell was Ms. Hendricks' alone, her ultimate interpretation that the date on the card indicated 1994 must be considered negligent in light of the uncertainty of all other parties who examined the card at the time and shortly afterwards.

While some of the blame for the sale could be laid as well to Mr. Adkins, the evidence shows he did not represent that he was still certified, but that he also was not sure of his card's expiration date. (Ex. 6; Tr. 95). Mr. Adkins has paid his civil penalty. The ultimate decision whether to go ahead with the sale was solely within the discretion and power of the retailer, Basin. The preponderance of the evidence indicates that the expiration date of Mr. Adkins' certification could not be verified at the time of the sale on August 8, 1992. The certification had in fact expired over a year earlier. In these circumstances, Respondent's decision to go ahead with the sale can only be ascribed to its failure to exercise due care, or to negligence.

- Compliance History

The Region determined that Respondent had one prior violation of FIFRA, and thus merited an assignment of two gravity adjustment points for compliance history. (Ex. 14, p. B-2; Ex. 13; Tr. 204). Mr. Osag testified that Basin had paid a $5000 penalty "in 1987" for the same violation alleged here -- sale of a RUP to an uncertified person (Tr. 205) . Mr. Osag referred to a computer printout tracking past violations as indicating a civil complaint filed against Respondent "in 1987." (Tr. 206).

However, the Region did not produce the actual complaint, consent order, or any other evidence of this past violation. Even more importantly, the Region did not prove the exact date of the violation. Under the ERP, to be considered a prior violation for the purposes of the gravity adjustment criteria, "the violation must have occurred within five years of the present violation." (Ex. 14, p. B-3). "This five-year period begins on the date of the final order, consent order, or payment of a civil penalty." (Id.). The Region's vague allusions to either a complaint or civil penalty against Basin in 1987 fall far short of the required proof of the existence of any such final order or payment within five years of the present violation.

The instant violation occurred on August 8, 1992. Thus, assuming it is true that Respondent paid a penalty or signed an order finding a violation in 1987, it is obviously at least equally likely that such violation took place before August 8, 1987 as after August 8, 1987 (60% of the year is before August 8), or more than five years before the present violation. Indeed, the Region's failure to prove the exact date could allow the drawing of an inference that any such prior violation was final more than five years earlier.

The Region bears the burden of proving that the proposed civil penalty is appropriate. 40 CFR §22.24. It failed to do so with respect to the consideration of Respondent's alleged prior violation. This failure to prove any prior violation under the ERP requires that zero points, rather than two, be assigned for the compliance history gravity adjustment criterion.

- Conclusion

The Respondent's total number of gravity adjustment points is thus six, rather than the eight proposed by the Region. A total gravity value of six points requires a 20% reduction in the matrix base penalty value, according to Table 3 in the ERP (Ex. 14, p. 22, C-1). This results in a penalty assessment of $4000 rather than the $5000 amount proposed by the Region. This penalty is consistent with the gravity of the violation and the size of Respondent's business, as required by FIFRA §14(a)(1)(4).

This amount represents an appropriate penalty for the violation here of selling a RUP to an uncertified applicator. Although $4000 is close to the maximum for a single violation, this offense strikes at the heart of the regulatory program to ensure the proper application of restricted use pesticides. This penalty is sufficient to act as a deterrent and uphold the integrity of the EPA's pesticide regulatory program.

Order

1. Respondent is assessed a civil penalty of $4000.

2. Payment of the full amount of this civil penalty shall be made within 60 days of the service date of this order by submitting a certified or cashier's check in the amount of $4000, payable to the Treasurer, United States of America, and mailed to:

EPA - Region 8
P.O. Box 360859
Pittsburgh, PA 15251-6859

3. A transmittal letter identifying the subject case and the EPA docket number, plus Respondent's name and address, must accompany the check.

4. If Respondent fails to pay the penalty within the prescribed statutory time period, after entry of the final order, then interest on the civil penalty may be assessed.

5. Pursuant to 40 CFR §22.27(c) this Initial Decision shall become the final order of the Agency, unless an appeal is taken pursuant to 40 CFR §22.30 or the Environmental Appeals Board elects, sua sponte, to review this decision.

Andrew S. Pearlstein
Administrative Law Judge

Dated: February 26, 1997
Washington, D.C.

[1] "Tr." is a reference to the stenographic transcript of the hearing, and "Ex." is a reference to the exhibit number. Transcript and exhibit references are representative only and are not intended to be complete or exhaustive.