UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

Umpqua Research Company, Docket No. 10-94-0228-FIFRA

Respondent

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge Issued: May 15,,1997
Washington, D.C.

Appearances

For Complainant:

Juliane Mathews
Cynthia Mackey
Assistant Regional Counsels
U.S. Environmental Protection Agency
Region 10
Seattle, Washington

For Respondent:

Gerald Colombo, Vice-President
John S. Aker, Administrative Director
Umpqua Research Company
Myrtle Creek, Oregon

I. Introduction

This case arises under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or "the Act"). 7 U. S. C. § 136 *et seq.* The U. S. Environmental Protection Agency ("EPA") seeks civil penalties against Umpqua Research Company

("Umpqua") totaling $15,000, pursuant to Section 14(a) of FIFRA, for two violations of Section 12(a)(1)(A) and one violation of Section 12(a)(1)(E) of the Act. 7 U. S. C. § § 136j (a)(1)(A) & 136j (a)(1)(E). The two Section 12(a)(1)(A) violations involve Umpqua's domestic distribution of an unregistered pesticide, MCV Iodinated Resin ("MCV Resin"). The Section 12(a)(1)(E) violation involves the respondents exportation of the MCV Resin to Thailand, without the required bilingual label.

A hearing on this matter was held in Roseburg, Oregon, on April 9, 1996. At the start of the hearing the parties submitted stipulations in which Umpqua admitted the three violations at issue. *See* Jt. Ex. 1. The focus of the hearing, therefore, was on the penalty amount to be assessed for these violations.

For the reasons set forth below, a civil penalty totaling $13,000 is assessed against Umpqua for the three FIFRA violations. Of this amount, $4,000 is being assessed for each of the Section 12(a)(1)(A) violations and a penalty of $5,000 is being assessed for the Section 12(a)(1)(E) violation.

II.. The Stipulated Facts

Umpqua has been a registered pesticide producing establishment since October 15, 1987. Stip. No. 1. Umpqua sold the pesticide MCV Resin to the Boeing Company on April 17, 1992. The sale amount was $12,000. Stips. No. 2 & 4. Umpqua also sold MCV Resin to Hamilton Standard on July 29, 1994. The amount of this sale was $9,052. Stip. No. 3. At the time of the Boeing and Hamilton Standard sales, Umpqua did not possess a pesticide registration number for MCV Resin. *See* Stip. No. 5. It was not until September 27, 1995, after the critical events in this case occurred, that Umpqua obtained a conditional pesticide registration for the pesticide MCV Resin. This conditional pesticide registration, however, was for manufacturing use only. Stip. No. 6; Tr. 9, 44.

On April 30, 1993, Umpqua sold MCV Resin to the Texas Engineering Co., Ltd. ("Texas Engineering"), in the country of Thailand. On July 2, 1993, the respondent sold MCV Resin to Loxley Utilities Services Co., Ltc. ("Loxley Utilities"), also located in Thailand. The total amount of these two sales was $10,620, plus freight. Stip. No. 8. The labels on the MCV Resin sold to Texas Engineering and Loxley Utilities were printed in English only. English is not the official language of Thailand. Stip. No. 9.

III. Discussion

The sole issue to be resolved here is the amount of civil penalty to be assessed against Umpqua for the three FIFRA violations. EPA seeks the assessment of $15,000, $5,000 for each violation, the maximum civil penalty available under Section 14(a)(1) of FIFRA. 7 U.S.C. § 1361(a)(1). To explain just how it arrived at this $15,000 penalty proposal, EPA submitted Complainant's Exhibit 3, "Enforcement Response Policy For The Federal, Insecticide, Fungicide, And Rodenticide Act (FIFRA)", and Complainant's Exhibit 5, "FIFRA Civil Penalty Calculation Worksheet". Umpqua contends that this penalty proposal is excessive and it argues that a warning, in lieu of a penalty assessment, is the appropriate sanction.

The starting point for the determination of the civil penalty to be assessed here is the statute. Section 14(a)(4) of FIFRA sets forth the statutory penalty factors that are to be considered in determining the penalty amount. 7 U.S.C. § 1361(a)(4). Section 14(a)(4) provides:

Determination of penalty. -- In determining the amount of the penalty, the Administrator shall consider [1] *the appropriateness of such penalty to the size of the business of the person charged,* [2] *the effect on the person's ability to continue in business,* and [3] *the gravity of the violation.* Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the envirorunent, the Adniinistrator may issue a warning in lieu of assessing a penalty.

Emphasis added [1]

The "Size of the Business" Penalty Criterion

The size of a violator's business is one of the factors that EPA considers when it calculates a proposed civil penalty. The method by which EPA takes into account the size of the respondent's business is set forth in its FIFRA Enforcement Response Policy. There, EPA has established three categories, or sizes, of businesses based upon gross revenue. *See* Compl. Ex. 3, Appendix C, Table 2. Category III includes those businesses with gross revenue ranging from $0 to $300,000. Category II covers those businesses with gross revenue falling between $300,001 and $1,000,000. Category I businesses are those businesses whose gross revenue exceeds $1,000,000. EPA explains that this three-tiered system is used because it distinguishes "between large companies which have (or presumably should have) sophisticated regulatory compliance programs and smaller companies that may not be able to afford them." Compl. Br. at 5.

Under this FIFRA penalty policy, therefore, EPA considers Umpqua to be a Category I business. EPA bases its determination in large measure upon a September, 1994, Dun and Bradstreet report showing that Umpqua's sales for fiscal year 1993 were $1,803,376. Compl. Ex. 4. In addition, the Dun and Bradstreet report also shows that the respondent's 1992 sales were over two and one-half million dollars. *Id*..

Umpqua challenges EPA's three-tired approach for detemu'ning the size of business in calculating a proposed penalty, arguing that such a system is inequitable. The, respondent asserts that EPA's approach fails to "distinguish between a company such as UMPQUA, which grosses between 1 and 2 million dollars per year and a company such as DuPont, which grosses 40 plus billion dollars per year." Resp. Br. at 2.

Umpqua's "size of business" argument is not well-taken. First, the respondent has failed to show that EPA's segregating businesses into three groups, according to gross revenue, is arbitrary, capricious, or an otherwise invalid method for considering one of the statutory penalty criteria of Section 14(a)(4). The fact that a company such as Dupont would be considered by EPA to be a large business does not render invalid the Agency's determination that Umpqua, although concededly much smaller in size than DuPont, is also a large business for purposes of the calculating a proposed FIFRA penalty. EPA's grouping of businesses into small, medium, and large categories for purposes of considering the "size of business" penalty criterion is not unreasonable.

Second, and more importantly, is the fact that EPA's civil penalty calculation is a proposal only. EPA has the burden of establishing before this court that the penalty which it seeks is appropriate. 40 C.F.R. § 22.27(b). Thus, the assessment of a penalty is based upon the evidence developed at the administrative hearing. *See* FIFRA Section 14(a)(3). 7 U.S.C. § 1361(a)(3). The size of Umpqua's business, therefore, is evaluated for penalty assessment purposes based upon the specific record evidence in this case. The fact that DuPont would also qualify as a "large business" under the Agency's FIFRA Enforcement Response Policy has no bearing on the weight to be accorded the case specific evidence relative to the size of Umpqua.

With respect to the facts of the case, Umpqua admits that its gross sales fall between one and two million dollars. *See* Resp. Br.at 2; *see also,* Compl. Ex. 4. Given this admission as to size of business, a $13,000 civil penalty for the three violations in this case is appropriate within the meaning of Section 14(a)(4) of FIFRA.

The "Ability to Continue in Business" Penalty Criterion

As to Umpqua's ability to continue in business, both sides cite to Complainant's Exhibit No. 4 as support for their position. Exhibit No. 4 is the Dun and Bradstreet report discussed above. This report was printed on September 14, 1994, and it bears the statement date of October 31, 1993. Umpqua cites to page 3 of Exhibit No. 4 as showing that respondent incurred a net loss of $202,245 in 1993, and a total net loss of $74,936 between June 30, 1991, and June 30, 1993. Resp. Br.at 3. Umpqua, however, provides no explanation in its post-hearing brief as to the significance of this data, particularly in light of the entire Dun and Bradstreet report. Nor did Gerald Colombo, an owner of the company and its vice-president (and the only witness to testify on behalf of respondent), explain the net loss data in this exhibit. In fact, , Mr. Colombo offered no testimony whatsoever as to Umpqua's financial condition. *See* Tr. 107-122.

EPA, on the other hand, submits that Complainant's Exhibit No. 4 actually shows that the assessment of a $15,000 penalty (*i.e.*, the amount sought by complainant) will not adversely affect Umpqua's ability to do business. In that regard, EPA points to the "Summary Analysis" of the Dun and Bradstreet report which states that the respondent's Estimated Financial Strength "indicates that the company has a worth from $300,00 to $500,000." In addition, the report's Composite Credit Appraisal "indicates an overall 'strong' credit appraisal" due to the fact that Umpqua's "obligations are retired satisfactorily and because of D&B's 'strong' assessment of the company's October 31, 1993, interim financial statement." Compl. Ex. 4 at 1.

Accordingly, this court finds that the Dun and Bradstreet report shows that the assessment of an $13,000 penalty against Umpqua for the three violations at issue will not adversely affect its ability to continue in business within the meaning of FIFRA Section 14(a)(4).

The "Gravity of the Violation" Criterion

Like the "size of the business" and the "ability to continue to do business" criteria, the "gravity of the violation" criterion supports the assessment of a $13,000 penalty in this case. With respect to the two Section 12(a)(1)(A) violations, Gerald Colombo, Umpqua's vice-president, testified that since 1988 the respondent knew that MCV Resin was a pesticide that had to be registered before it could be distributed or sold in the United States. Tr.118. In fact, in a letter to EPA Region X, dated February 27, 1992, Mr. Colombo stated: "We

initiated an application for registration [of MCV Resin] a few years ago but gave up after being unable to figure out a path through the red tape jungle." Compl. Ex.12 at 2. *See* Compl. Ex. 7b, an October 23, 1987 letter from EPA to Umpqua ("Before selling or distributing your product you must apply for and obtain a registration from EPA."); *see also,* Compl. Ex. 8 (MCV Resin registration-related material).

Clearly, Umpqua was aware of the fact that MCV Resin was a pesticide within the meaning of Section 2u of FIFRA, 7 U.S.C. § 136(u), and that this product was subject to FIFRA registration. Respondent, therefore, was negligent in selling the unregistered MCV Resin to Boeing and to Hamilton Standard. The fact that Boeing and Hamilton Standard may have used the MCV Resin in connection with NASA's space program does not make Umpqua any less negligent for selling an unregistered pesticide. Indeed, Lyn Frandsen, EPA Region 10's team leader in the enforcement of the pesticide program, testified that the Agency makes no distinction between distribution of a pesticide to a commercial entity and distribution of a pesticide to a governmental entity. Tr. 35, 38. Nor has any rationale been advanced by Umpqua as to why such a distinction should be drawn in the first place.

Umpqua also was negligent in exporting the MCV Resin to Thailand in violation of FIFRA Section 12(a)(1)(E). Although admitting to the violation, the respondent attempts to avoid blame by arguing that the 1988 edition of FIFRA supplied to Umpqua by EPA, when it registered its facility, contains no foreign language requirement. Resp. Br. at 3. This defense must fail.

Of particular significance here is the fact that on two occasions the EPA has formally published in the Federal Register its Export Policy which addresses the languages to be used in the labeling of exports. *See* 45 Fed. Reg. 50,274 (July 28, 1980) and 58 Fed. Reg. 9062 (February 18, 1993). This policy is plainly spelled out at 40 C.F.R. § 168.65, "Pesticide export label and labeling requirements". It requires, in part, that in addition to English, "either the language which is used to conduct official government business, or the predominately spoken or written language of the country of import must appear on the labeling." *See* 40 C.F.R.§ 168.65(b)(4).

EPA's publication of the export labeling provisions in the Federal Register and in the Code of Federal Regulations was sufficient to put all exporters of pesticides on notice as to its requirements. As an exporter of the pesticide MCV Resin, Umpqua should have been aware of this labeling requirement and it was negligent in failing to so comply.

As noted by EPA, there are serious consequences in exporting a pesticide that does not satisfy the bilingual labeling requirement. For instance, non-English speaking individuals who come into contact with the pesticide will not know what precautions to take when handling the product. Nor will theses individuals know what to do if they are exposed to the product, or if a spill occurs. EPA Br. at 8, citing Tr. 70.

The specific health risks posed by the MCV Resin are set forth in the Material Safety Data Sheet ("MSDS") for this pesticide. This MSDS identifies the "Acute Effects" of exposure to this pesticide as "eye irritation".[2] The MSDS identifies the effects of "Chronic Exposure" as "insomnia, conjunctivitis, inflammation of the nasal mucous, bronchitis, tremor, rapid heart beat, diarrhea, and weight loss" as well as a possible "[a]llergic sensitization." Compl. Ex. 2, Attach. 4 at 12. *See* Tr. 50-52.

While the record certainly documents the hazards associated with short and long term exposure to MCV Resin, Umpqua properly points out that such hazards were reduced somewhat by the particular circumstances of the case. First, the quantity of MCV Resin involved here was small. A total of 64 grams of the resin was delivered to Hamilton Standard in sealed containers, 10 pounds of the resin was delivered to Boeing, and approximately two cubic feet of the resin was shipped to Thailand. Resp. Br. at 5; Tr. 108-109.[3] Given these small quantities and their limited use, the dangers presented by chronic exposure appears to be substantially reduced.

Second, the use of the MCV Resin delivered to Hamilton Standard and to Boeing was subject to close scrutiny by scientific and medical personnel associated with the NASA space program. For example, the resin shipped to Hamilton Standard was sent in cartridges, touched only by trained Umpqua employees. Tr. 108. Also, a NASA "White Paper" specifically addressed the "Water System Servicing and Operations" and "Crew Medical Surveillance" of shuttle operations. Resp. Ex. 11.

Accordingly, upon consideration of the gravity criterion, the penalty assessment requested by EPA for the two violations of Section 12(a)(1)(A) is reduced by $1,000 for each violation. The record does not support a siniilar reduction for the Section 12(a)(1)(E) export violation.

ORDER

For the foregoing reasons, Umpqua Research Company is ordered to pay a civil penalty of $13,000 pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 1361(a)(1), for two violations of Section 12(a)(1)(A) and one violation of Section l2(a)(1)(E) of the Act.

7 U.S.C. §§ 136j(a)(1)(A) & 136j(a)(1)(E).

Payment of this penalty shall be made within 60 days of the date of this order. Payment shall be made by mailing, or presenting, a cashier's or certified check made payable to the Treasurer of the United States, to the Regional Hearing Clerk, U.S. EPA Region 10, Mellon Bank, P.O. Box 36903, Pittsburgh, PA. 15251-6903.[4]

Carl C. Charneski

Administrative Law Judge

[1] Section 22.35 of the Consolidated Rules of Practice provides that, in addition to the statutory penalty criteria discussed above, in assessing a civil penalty the Judge is to consider, "(1) respondent's history of compliance with the Act or its predecessor statute and (2) any evidence of good faith or lack thereof. " 40 C.F.R. § 22.35. Compliance history and good faith are considerations properly taken into account under the "gravity of the violation" criterion of Section 14(a)(4).

[2] It also was noted that "[f]inely ground particles of similar material caused corneal damage in rabbit eyes." Compl. Ex. 2, Attach. 4 at 12.

[3] Complainant's Exhibit No. 12 indicates that approximately 100 pounds of MCV Resin was supplied to Federal agencies, principally to NASA. *See* Tr. 54. This case, however, involves only the limited quantities mentioned above.

[4] Unless this decision is appealed to the Environmental Appeals Board ("EAB") in accordance with 40 C.F.R. § 22.30, or unless the EAB elects to review this decision *sua sponte,* it will become a final order of the EAB. 40 C.F.R. § 22.27(c).