

9/3/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
Terra International, Inc.,)	Docket Nos. I.F. & R.-VII-996C-
d/b/a Terra Chemicals)	90P & 995C-90P
International, Inc., and)	
Brian Smith,)	
)	
Respondents)	

Federal Insecticide, Fungicide and Rodenticide Act - Restricted Use Pesticides - Noncertified Applicators - Direct Supervision

Evidence failed to sustain Respondents' contention that restricted use pesticide (RUP), applied by a noncertified applicator, was applied under the direct supervision of a certified applicator within meaning of section 2(e)(4) of Act and 40 CFR § 171.2(28).

Appearance for Complainant:

Rupert G. Thomas, Esq.
Assistant Regional Counsel
U.S. EPA, Region VII
Kansas City, Kansas

Appearances for Respondents:

Mark A. Kalafut, Esq.
Vice President & General Counsel
Terra International, Inc.
Sioux City, Iowa

Robert R. Eidsmoe, Esq.
Eidsmoe, Heidman, Redmond,
Fredregill, Patterson & Schatz
Attorneys at Law
Sioux City, Iowa

INITIAL DECISION

This is a civil penalty proceeding under section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), as amended (7 U.S.C. § 1361(a)). The proceeding was commenced by two separate complaints, signed by the Director, Air and Toxics Division, U.S. EPA, Region VII, on February 23, 1990, one charging Respondent Terra International, Inc. (Terra) and the other charging Brian Smith, an employee of Terra, with violations of the Act. Specifically, it was alleged that on May 10, 1988, Brian Smith, while acting within the scope and course of his employment, applied the restricted use pesticide (RUP) Bladex 4L, EPA Registration No. 201-281, to a Loyadell Farms' corn field near Mt. Pleasant, Iowa, for the purpose of controlling grass. The complaint against Terra alleges that Mr. Smith was not a certified applicator at the time of the mentioned application, nor was he acting under the supervision of a certified applicator. Thus, it was alleged that Terra acted in violation of section 12(a)(2)(F) (7 U.S.C. § 136j(a)(2)(F)), which makes it unlawful for any person to, inter alia, "make available for use, or to use, any registered pesticide classified for restricted use . . . other than in accordance with section 136a(d) of this title and any regulations thereunder."^{1/}

^{1/} Section 12(a)(2) of the Act provides that

(2) It shall be unlawful for any person--

* * *

(continued...)

Section 3(d)(1)(C) (7 U.S.C. § 136a(d)(1)(C)), requires that any pesticide which is classified for restricted use shall be applied only by or under the direct supervision of a certified applicator.^{2/} For this alleged violation, it was proposed to assess Terra a penalty of \$5,000. The complaint against Brian Smith alleged essentially the same facts, except it averred that he

^{1/}(...continued)

(F) to distribute or sell, or to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with section 136a(d) of this title and any regulations thereunder, except that it shall not be unlawful to sell, under regulations issued by the Administrator, a restricted use pesticide to a person who is not a certified applicator for application by a certified applicator;

* * * *

^{2/} Section 3(d)(1)(C) of the Act provides in pertinent part:

(C) If the Administrator determines that the pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered, or for one or more of such uses, or in accordance with a widespread and commonly recognized practice, may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator, the Administrator shall classify the pesticide, or the particular use or uses to which the determination applies, for restricted use:

(i) If the Administrator classifies a pesticide, or one or more uses of such pesticide, for restricted use because of a determination that the acute dermal or inhalation toxicity of the pesticide presents a hazard to the applicator or other persons, the pesticide shall be applied for any use to which the restricted classification applies only by or under the direct supervision of a certified applicator.

* * * *

"used the RUP" Bladex 4L other than in accordance with section 3(d). For this alleged violation, it was proposed to assess him a penalty of \$500.

By letter, dated March 16, 1990, Respondents answered, admitting application of the RUP alleged in the complaint, asserting that Mr. Smith had passed the certified applicator's exam in January of 1988 and that it was only through a mistake by Terra's office in Winfield, Iowa in failing to pay the license fee that a license to Mr. Smith was not actually issued. The fee was allegedly paid in July of 1988, at which time a license was issued to Mr. Smith. The answer further alleged that Mr. Smith was acting under the supervision of Mr. Jerry Morris, a certified applicator and manager of Terra's office in Muscatine, Iowa. Respondents requested a hearing. By an order, dated May 11, 1990, these proceedings were consolidated.

A hearing on this matter was held in the U.S. Courthouse in Sioux City, Iowa on June 11, 1991.

Based on the entire record, including the briefs and proposed findings of the parties, I make the following:

FINDINGS OF FACT

1. Terra International, Inc. (Terra) was at all times pertinent hereto a corporation authorized to and doing business in the State of Iowa. Terra is an agri-business company which provides fertilizers, chemicals, seed and product application services to farmers, dealers, and distributors.
2. Brian Smith, at all times pertinent hereto, was an employee of Terra at Terra's Winfield, Iowa, office. He began his employment with Terra in January 1988 (Tr. 52). On May 10, 1988, while acting in the scope and course of his employment, Mr. Smith applied Bladex 4L, a RUP, to 90 acres of corn ground farmed by Loyadell Farms near Mt. Pleasant, Iowa.^{3/} The application was made with a machine he described as a "three-wheel floater" (Tr. 55).
3. On May 26, 1988, Brian Smith applied a "rescue treatment" of Tandem (EPA Reg. No. 464-615) and Terra Atrazine 90 DF (EPA Reg. No. 9779-253-14774) to the Loyadell Farms' corn field identified in finding 2).^{4/} This application was made with a "pickup rig."

^{3/} Smith, Tr. 53; Use/Misuse Investigation Report, dated June 3, 1988, C's Exh 5; Custom Application Record, Rs' Exh F.

^{4/} Smith, Tr. 58; C's Exh 5; Custom Application Record, Rs' Exh G. A "rescue treatment" is so-called, because the initial application failed in whole or in part to accomplish its intended purpose. Although the Use/Misuse Investigation Report states that the "rescue treatment" was made on May 26, 1988, testimony at the hearing was to the effect the second application was made on May 28, 1988.

4. On June 3, 1988, Mr. Richard Colwell, a pesticide investigator for the Iowa Department of Agriculture conducted a use/misuse investigation in response to a complaint by a Mr. Dan Peterson (Tr. 8; C's Exh 5). Mr. Peterson owns property to the west and north of the Loyadell Farms' corn field upon which Brian Smith had made the pesticide applications referred to in findings 2 and 3.^{5/} He (Peterson) believed that there may have been drift onto his property from the second pesticide application. The only damage he specifically described was to a privet hedge which runs along the eastern and southern borders of his property. Mr. Colwell concluded that damage to the hedge was very slight (Tr. 21; C's Exh 5).
5. Observing the corn field upon which the pesticide applications referred to previously had been made, Mr. Colwell reported that wheel or tire tracks from the two applications were still evident (C's Exh 5). He concluded that the "floater," used in the earlier "Bladex" application, had traveled within 31 feet and the "pickup rig" within 20 feet of Peterson's property line (Tr. 20, 21). Judging from vegetation he saw in the corn field, Mr. Colwell reported that the field had apparently been sprayed to within 10 or 12 feet (three or four rows) from the property line.

^{5/} There is evidence that Loyadell Farms rented the corn field from the Peterson family. Indeed, Terra's answer indicates erroneously that the Bladex application was made on behalf of Mr. Peterson.

6. In the course of his investigation, Mr. Colwell collected a soil sample from a point near the eastern hedge on Mr. Peterson's property and a composite vegetative sample from the hedge (Tr. 21, 22). The soil sample showed a Bladex concentration of 1.6 ppm and a Tandem concentration of .016 ppm. Atrazine was not detected in this sample. The vegetative sample from the hedge tested .54 ppm Atrazine, 1.7 ppm Bladex and .030 ppm Tandem.
7. After completing his interview of Mr. Peterson, Mr. Colwell visited Terra's offices in Winfield, Iowa (Tr. 10; C's Exh 5). Mr. Michael Reschly was the acting manager. Mr. Reschly confirmed that Brian Smith was responsible for the pesticide applications referred to herein and provided Colwell copies of Terra's spray records for the applications. These records (Rs' Exhs F and G) are not dated. Mr. Colwell determined that none of the applicators at Terra's Winfield office were currently certified and that the office or plant did not have a commercial applicator's license (Tr. 14, 15, 17). Mr. Reschly reportedly was of the belief that Terra's head (Sioux City) office had taken care of licensing and certification requirements for the Winfield operations.^{6/}

^{6/} Mr. Reschly is no longer employed by Terra and did not appear as a witness at the hearing. Although Complainant and Respondents proffered statements or affidavits signed by Mr. Reschly, counsel for the parties refused to waive cross-examination and Mr. Reschly was not shown to be unavailable within the meaning of Rule 22.22(d). The statements were not admitted into evidence.

According to Reschly, the failure of anyone in the Winfield office to be certified was a mistake by the Sioux City office.

8. Mr. Jerry Morris is a region manager for Terra located in Muscatine, Iowa (Tr. 31-33). He was location manager for Terra at Muscatine and a certified applicator in 1988 at the time of the pesticide applications in question here. He testified that Harold "Charlie" Todd, the Terra location manager at Winfield, had suffered an incapacitating injury in April of 1988 and that his temporary replacement was Mr. Mike Reschly (Tr. 35). Morris estimated that Winfield was approximately 45 miles from Muscatine.
9. Mr. Morris confirmed that Terra's Winfield facility caused an application of Bladex 4L to be made on a Loyadell Farms' field near Mt. Pleasant, Iowa on May 10, 1988 (Tr. 36, 37). He also confirmed that the application was made by Brian Smith upon the instructions of Mike Reschly. Mr. Morris did not know the time the application was made, but thought it was in the morning (Tr. 49). He testified that both Mr. Reschly and the Loyadell Farms' manager, a man named Fisher, instructed Brian to stay away from buildings so as not to cause any problems to vegetation growing in those particular areas. The Terra Custom Application Record for the second application states after Special Instructions "Stay A Few Rows Away From House" (Rs' Exh G). Mr. Morris testified that the [Dan] Peterson farm was to the northwest of the field sprayed by Terra for Loyadell Farms (Tr. 37). He (Morris) was under the impression

that Mr. Peterson's complaint (finding 4) concerned the application of May 10, 1988.^U

10. Mr. Morris testified that at the time of the Bladex application at issue here, Brian Smith had completed a course of instruction concerning the application of RUPs and had passed the test to become a certified applicator (Tr. 43). A Commercial Applicator Certification Form signed by Brian Smith and a representative of the Cooperative Extension Service, Iowa State University indicates that Mr. Smith was present on February 19, 1988, and did participate in a training program for certification to purchase and apply RUPs (Rs' Exh C). The form reflects that the training was in agricultural weed control and that the fee for a commercial applicator's license is \$25 for one year or \$75 for three years. According to Mr. Morris, a similar applicator's certification form was prepared and submitted [to whom not stated] for Mr. Reschly. A Commercial Pesticide Applicator's license was issued to Brian Smith on July 16, 1988 (Rs' Exh D).
11. Although Brian Smith had been hired by Harold Todd, Mr. Morris had discussed Brian's employment with Todd and was generally familiar with Brian's experience and qualifications (Tr. 45). Because Brian had applied Bladex before and there was nothing unusual about the application at Loyadell, Mr. Morris stated

^U Tr. 39, 40. Although not admitted into evidence, a statement and sketch purportedly by Mike Reschly, (Rs' proposed Exh E), appears to confirm that a complaint was received concerning a pesticide application on May 10, 1988, by Brian Smith.

that Brian was not given any special instructions as to this application other than to stay away from buildings (Tr. 46). Mr. Morris testified that after Harold Todd had his accident, he (Morris) explained to Mike Reschly and Brian Smith that, if they needed any advice or had any problems to call him and he would be available (Tr. 47). Asked why he would give such instructions, if he thought Brian Smith was a certified applicator, Morris replied that whether Brian was certified or not, he (Morris) was available in any situation. He stated that he was physically accessible to Brian Smith at all times during the May 10 pesticide application, because Brian had a two-way radio in his sprayer by which he could contact Mike Reschly in Winfield, who in turn could call him (Morris) in Muscatine (Tr. 47, 48). He testified that Muscatine was 45-to-50 miles from the application site and that he could go there in approximately 45 minutes, depending upon traffic.

12. Mr. Brian Smith testified that he was employed by Terra in January of 1988 (Tr. 51, 52). Prior to that he was employed by a firm known as Twin State Engineering which was in the liquid fertilizer and chemical business. He stated that, while employed by Twin State, he had accompanied a certified applicator in the application of Bladex to a field. Since his employment by Terra, Mr. Smith had studied what he referred to as the "core manual" [concerning the handling, use and application of pesticides] and attended training sessions put on by various chemical companies. He opined that he had

completed all of those [courses]. He identified the Commercial Applicator Certification Form (Rs' Exh C) as proof that he had passed "the core test" and the "category test" (Tr. 53). Mr. Smith learned that he was not certified at the time of the Bladex application for Loyadell Farms, when the State made its investigation (Tr. 60). He attributed the failure to receive his license as a "mix up" between the Winfield office and the Sioux City office as to which office was to send in the license fee.

13. Mr. Smith was familiar with the label on Bladex and knew that it was a restricted use pesticide (Tr. 52, 53). The label for Bladex 4L states in part: "Restricted Use Pesticide." "For retail sale and use only by Certified Applicators or persons under their direct supervision. . . ."^{8/} Smith testified that he was of the belief that he was a certified applicator on May 10, 1988. Additionally, he testified that a certified applicator was accessible to him on that date. He explained that after Charlie Todd was hurt, Mike Reschly was appointed temporary manager [at Winfield] and that he was told by both Reschly and Jerry Morris that, if he had any problems and Mike

^{8/} C's Exh 4. Although the copy of the label in the record is difficult to read, Precautionary Statements indicate that the product may be toxic if swallowed, that it is harmful if inhaled or absorbed through skin and that it causes temporary eye injury. Protective clothing is to be worn when mixing or loading and long trousers and long-sleeved shirts are to be worn when applying. Additionally, the product is not to be applied in such a manner as to expose unprotected persons and the solution and water contaminated with product may cause serious illness or death to bovines.

couldn't answer his questions, he was to talk to Jerry Morris (Tr. 54, 55). He (Smith) stated that he had a two-way radio in the sprayer by which he could contact Mike Reschly in Winfield, who could use the telephone to call Mr. Morris in Muscatine. He estimated that the Loyadell corn field, which he sprayed on May 10, 1988, was 40-to-45 miles from Muscatine and that Mr. Morris could drive that distance in 45 minutes or so depending on traffic.

14. Brian Smith confirmed that he had been instructed to apply Bladex to the Loyadell Farms' field identified previously by Mike Reschly (Tr. 55, 56). The only specific instructions Smith recalled receiving were to "stay away from the buildings."^{2/} He testified that there were no peculiar or unusual circumstances to make the Loyadell application different from any other application and that he had no problems making the application (Tr. 57, 58). In a related matter, he answered affirmatively a question as to whether himself and other personnel from the Terra Winfield plant frequently made pesticide applications in the Muscatine area (Tr. 61). He indicated that the reverse was true as to

^{2/} As indicated (finding 8), this instruction appears on the Terra application record for the "rescue treatment" (Rs' Exh G). No similar statement appears on the record for the May 10, 1988, Bladex application (Rs' Exh F). One would expect such an instruction to be given prior to the "rescue treatment," if Dan Peterson had in fact complained to Terra concerning the earlier Bladex application (supra note 7).

Muscatine, in that personnel from that office or plant would make pesticide applications in the Winfield area.

15. Terra Custom Application Records (Rs' Exhs F and G) are forms carried by Smith in the "floater" and indeed, by all Terra employees applying pesticides. The forms contain a check list of questions to be answered prior to commencing the application and after the job is completed. Items to be checked prior to commencing the application include verification of the amounts of chemical for each sprayer load, that the pesticides are compatible, that the applicator has read and understands the labels of products to be applied, that the applicator has the proper labels with him, that the applicator (sprayer) has been properly calibrated and nozzles checked, that the applicator is certain of the location of the area to be treated and that the possibility of drift has been eliminated. Questions to be answered after the job has been completed include: are total gallons applied consistent with total acres and has the application record been completely and accurately completed. The form instructs that a "no" answer means stop until the situation is corrected and that, if you cannot correct the problems, contact your manager before proceeding.
16. Brian Smith testified that he filled out part of the forms prior to the applications described herein and the balance of

the forms after the applications were completed.^{10/} The forms in evidence (copies) are undated and contain a space for an Applicator Certification Number which is blank. Only the record for the Bladex application (Rs' Exh F) states a wind direction, namely, "blowing SE." At the hearing, Mr. Smith confirmed that the wind was blowing from the northwest (Tr. 57). Inconsistently, with Mr. Morris (finding 9), however, he (Smith) testified that the Peterson property was to the northeast of the Loyadell corn field.

17. Mary Jane Wingett, an Environmental Protection Specialist for EPA, testified as to the calculation of the proposed penalties (Tr. 27-30). For this purpose, she explained that the Guidelines for the Assessment of Civil Penalties Under FIFRA, published in the Federal Register in 1974 [39 Fed. Reg. 27711, July 31, 1974] were utilized. The civil penalty computation worksheets (C's Exh 7) indicate that the violations at issue here were classified as "Use Violations," analogous to "use of a pesticide inconsistent with its labeling," Item E28 of the Guideline schedule and placed in Category A, "adverse effects highly probable." Because available information indicated Terra's gross sales exceeded one million dollars, the penalty for it was set at the maximum or \$5,000 (Tr. 29). Brian

^{10/} Tr. 58. There are grounds for questioning the care by which the forms were completed, because, even though the applications described herein were of liquid, blocks on the forms were marked indicating that spread patterns were checked. Spread patterns are only applicable to dry pesticide applications.

Smith's sales were considered to put him in the lowest category and the proposed penalty for him was \$500. Respondents have made no effort to dispute the bases upon which the proposed penalties were calculated. They do argue, however, that any penalties assessed should be nominal (Post-hearing Brief at 10, 11).

C O N C L U S I O N S

1. Bladex 4L is a restricted use pesticide (RUP) which is to be applied only by, or under the direct supervision of, a certified applicator.
2. On May 10, 1988, Brian Smith, an employee of Terra International, Inc. (Terra), while acting in the course and scope of his employment, from Terra's Winfield, Iowa, office, applied the RUP Bladex 4L to a Loyadell Farms' corn field, located near Mt. Pleasant, Iowa.
3. At the time of the application referred to in para. 2 above neither Brian Smith nor any employee of Terra's Winfield, Iowa, office were certified applicators.
4. The mentioned application of Bladex 4L was not made under the direct supervision of a certified applicator as contemplated by the Act and regulation and both Terra and Brian Smith are liable for civil penalties.
5. An appropriate penalty is the sum of \$1,000 for Terra and \$50.00 for Brian Smith.

DISCUSSION

It is undisputed that Brian Smith was not a certified applicator, in the sense that he had not been issued a certified applicator's license, at the time he applied the RUP Bladex 4L to the Loyadell Farms' corn field on May 10, 1988. Respondents contend, however, that he was acting under the "direct supervision of a certified applicator" within the meaning of the statute and regulation and thus, no violation of FIFRA has been shown (Post-hearing Brief at 7).

The statutory definition of "under the direct supervision of a certified applicator" (FIFRA § 2(e)(4)) provides that a pesticide shall be considered to be applied under the direct supervision and control of a certified applicator if it is applied by a competent person acting under the instructions and control of a certified applicator, who is available if and when needed.^{11/} The regulation (40 CFR § 171.2(28)) amplifies the statutory definition slightly by including a requirement that the certified applicator

^{11/} Section 2(e)(4) of FIFRA provides:

(4) Under the direct supervision of a certified applicator. Unless otherwise prescribed by its labeling, a pesticide shall be considered to be applied under the direct supervision of a certified applicator if it is applied by a competent person acting under the instructions and control of a certified applicator who is available if and when needed, even though such certified applicator is not physically present at the time and place the pesticide is applied.

be responsible for the actions of the person actually applying the pesticide.^{12/}

Nothing on the label of Bladex 4L alters or restricts the mentioned requirements or requires the physical presence of a certified applicator when the pesticide is applied. The record shows that Brian Smith was employed out of and supervised out of Terra's Winfield office or facility. Additionally, directions to apply Bladex 4L to the Loyadell Farms' corn field and any specific instructions as to the application^{13/} were issued to Brian Smith by Michael Reschly, Terra's temporary location manager at Winfield,, who was also not a certified applicator at the time (findings 9, 10, and 14). The operative words of section 2(e)(4) of the Act and of 40 CFR § 171.2(28) (supra notes 11 and 12) are that, in order to be applied under the direct applicator, the pesticide must be applied by a competent person under the "instruction and control" of a certified applicator. Instruction simply means "something given by way of direction or order" and

^{12/} "Under the direct supervision of" is defined (40 CFR § 171.2) as follows:

(28) The term "under the direct supervision of" means the act or process whereby the application of a pesticide is made by a competent person acting under the instructions and control of a certified applicator who is responsible for the actions of that person and who is available if and when needed, even though such certified applicator is not physically present at the time and place the pesticide is applied.

^{13/} There is room for doubt as to whether Brian Smith had in fact been instructed to "stay away from buildings" for the Bladex application (supra note 9).

control means the "power or authority to guide or manage."^{14/} Prima facie then, Brian Smith was not acting under the direct supervision of a certified applicator in making the Bladex application at issue, because he was not acting under the "instructions and control" of a certified applicator.

Respondents, however, cite the "Standards for supervision of noncertified applicators by certified private and commercial applicators" 40 CFR § 171.6.^{15/} The cited regulation eliminates the word "control," which appears in section 2(e)(4) of the Act and 40 CFR § 171.2(28), and appears to relax the requirements for "direct supervision" in that it provides that "direct supervision"

^{14/} Webster's Third New International Dictionary (1986).

^{15/} The cited section provides:

§ 171.6 Standards for supervision of noncertified applicators by certified private and commercial applicators.

(a) Certified applicators whose activities indicate a supervisory role must demonstrate a practical knowledge of Federal and State supervisory requirements, including labeling, regarding the application of restricted use pesticides by noncertified applicators.

The availability of the certified applicator must be directly related to the hazard of the situation. In many situations, where the certified applicator is not required to be physically present, "direct supervision" shall include verifiable instruction to the competent person, as follows: (1) Detailed guidance for applying the pesticide properly, and (2) provisions for contacting the certified applicator in the event he is needed. In other situations, and as required by the label, the actual physical presence of a certified applicator may be required when application is made by a noncertified applicator.

* * * *

shall include verifiable instruction to the competent person, as follows: "(1) (d)etailed guidance for applying the pesticide properly, and (2) provisions for contacting the certified applicator in the event he is needed."^{16/} Respondents point out that sometime after Michael Reschly was appointed temporary manager at Winfield and prior to the application at issue here, Messrs. Reschly and Smith were informed by Jerry Morris, a certified applicator and Terra's location manager in Muscatine at the time, that, if they needed any advice or had any problems, to call him and he (Morris) would be available (finding 11). Respondents contend that Terra's Custom Application Record forms (findings 15 and 16) constitute detailed guidance as to the proper application of Bladex so as to satisfy the first requirement of section 171.6 (supra note 15) and that Mr. Morris's availability satisfies the second requirement of the cited section. Accordingly, they argue that the application at issue was made under the direct supervision of a certified applicator (Post-hearing Brief at 9, 10).

It is concluded, however, that section 171.6 was not intended to alter or relax the statutory and regulatory definition of "under

^{16/} Complainant argues that Brian Smith was not acting under the supervision of a certified applicator, because he had to contact Jerry Morris through Michael Reschly and because of Morris' distance from the application site (Post-hearing Brief at 6, 7). The operative words of the statute and regulation are that the application be made under the "instructions and control" of a certified applicator who is available "if and when needed." And, if guidance that the pesticide be properly applied came from a certified applicator, neither the fact subsequent contact with Morris was through Reschly nor Morris' distance from the site would be controlling.

the direct supervision of a certified applicator" (supra notes 11 and 12). This is because section 171.6 provides that "direct supervision shall include verifiable instruction. . ." (emphasis added), which indicates that requirements (1) and (2) following are not exclusive. Therefore, a RUP is not applied under the direct supervision and control of a certified applicator, unless it is applied under the "instructions and control of a certified applicator" (FIFRA § 2(e)(4); 40 CFR § 171.2(28)). In this regard, the evidence shows that, while Brian Smith was aware that Jerry Morris was available through Michael Reschly, if needed, he (Smith) regarded himself as a certified applicator and there is no indication he considered the application at issue was being made under Morris' instructions and control. Moreover, the advice given to Smith and Reschly by Morris was general and unrelated to any specific pesticide application and there is no evidence he was aware, prior to the application at issue, that the application was to be made. Under these circumstances, it is concluded that Respondents haven't established their contention the Bladex application in question was made under the instructions and control of a certified applicator within the meaning of FIFRA § 2(e)(4) and 40 CFR § 171.2(28).^{17/}

^{17/} Although Complainant has the burden of establishing all elements of the violations alleged, once Complainant has established prima facie that the application was not made under the direct supervision of a certified applicator, the burden of producing evidence to the contrary is on Respondents. See Rule 22.24 of the Consolidated Rules of Practice (40 CFR Part 22).

Notwithstanding the foregoing, Respondents' contention that the Custom Application Record forms constitute detailed guidance for the pesticide to be properly applied within the meaning of section 171.6 will be briefly addressed in case the issue is reached on appeal. The mentioned forms are used by Terra to record the application of RUPs as well as other pesticides and other than a space for the EPA Registration Number in the case of RUPs, which in this instance was left blank, and a space for the Applicator's Certification Number, which was also left blank (Rs' Exh F), there is nothing on the form to distinguish a RUP application from any other pesticide application. Careful attention to items on the Custom Application Record, which include verification that the amounts of chemical for each sprayer load are correct, that the applicator (employee) has read and understands the label and that the possibility of drift has been eliminated, would, of course, help to assure that the pesticide was properly applied.

The distinguishing feature of a RUP, however, is the increased hazard resulting from its handling and use and some attention to safety requirements such as the wearing of protective clothing during mixing and loading and wearing long trousers and long-sleeved shirts during application (supra note 8) may appropriately be considered part of instructions for the pesticide to be properly applied. Respondents contend that Brian Smith's competence and qualifications are factors to be considered in determining whether the application was made under the direct supervision of a certified applicator (Reply Brief at 3, 4). Because it is

reasonable that the detail of the guidance required to apply the pesticide properly may vary depending on the competence, qualifications and experience of the applicator and because there is no question of Brian Smith's competence, qualifications and experience, it is concluded that under appropriate circumstances the Custom Application Record forms may constitute detailed guidance for properly applying the pesticide within the meaning of section 171.6. The appropriate circumstance, absent here, is it must be shown that the guidance came from a certified applicator.

P E N A L T Y

Having determined that Respondents violated the Act as alleged in the complaint, it is necessary to determine an appropriate penalty. FIFRA § 14(a)(4) (7 U.S.C. § 1361(a)(4)) provides that in determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business and the gravity of the violation.^{18/} The record reflects that the proposed penalties were computed based on

^{18/} Section 14(a)(4) of the Act provides:

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

the 1974 FIFRA Civil Penalty Guidelines and analogized to use of a pesticide inconsistent with its labeling, Item E28 of the schedule, where "adverse effects were highly probable" (finding 17). Because Terra's sales were considered to be in excess of one million dollars, the penalty for it was set at \$5,000, the maximum for a single valuation. The penalty for Brian Smith was set at \$500, the minimum provided by the Penalty Guideline for use of a pesticide inconsistent with its labeling where "adverse effects [are] highly probable."

Under Rule 22.27(b) of the Rules of Practice, 40 CFR Part 22, I am required to consider, but not necessarily to follow, any penalty guidelines issued under the Act. There being no issue as to the appropriateness of the penalty to the size of Terra's business or to the effect of the penalty on Terra's ability to continue in business, the matter turns on the "gravity of the violation."

"Gravity of the violation" is usually considered from two aspects: gravity of the harm and gravity of the misconduct. See High Plains Cooperative Inc., Docket No. I. F. & R.-VIII-198C (Initial Decision, June 29, 1987). Although not explained by Ms. Jane Wingett, Complainant's penalty witness at the hearing, the conclusion that "adverse effects were highly probable" apparently stems from the view that all use violations involving RUPs should be so categorized, because RUPs by definition involve pesticides which may cause unreasonable adverse effects on the environment.

Because this view is at odds with the facts herein, I decline to follow the Penalty Guideline.

This case is quite similar to High Plains Cooperative, Inc., supra. In that case, a RUP was applied in Wyoming by a noncertified applicator under the supervision of a Mr. Alan Curtis, who was certified in Nebraska, but whose Wyoming license or certification had expired. Mr. Curtis was fully qualified to be a certified applicator in Wyoming, but was unaware that his certification had expired. Upon being informed of that fact, he immediately reapplied and was issued a certified applicator's license by the State of Wyoming. Under the circumstances, the gravity of the harm and the gravity of the misconduct were determined to be slight and the \$5,000 penalty proposed by Complainant was reduced to \$500. Upon Complainant's appeal, this decision was affirmed by the Chief Judicial Officer, High Plains Cooperative, Inc., FIFRA Appeal No. 87-4 (Final Decision, July 3, 1990).

Likewise, Brian Smith was fully qualified to be a certified applicator in the State of Iowa and indeed, considered himself to be a certified applicator, but he had not been issued a license solely because the applicable fee had not been paid. The failure to pay the license fee was apparently due to a mix-up in communications, between Terra's head (Sioux City) office and its Winfield office out of which Mr. Smith was employed (findings 7 and 12). While High Plains is distinguishable upon the ground that in the instant case there was a complaint of drift, and apparently

some minimal drift, onto adjacent property owned by Daniel Peterson, it defies reason to suggest that this drift would or could have been avoided had the formality of issuing a certified applicator's license to Brian Smith been accomplished. Moreover, although it has been concluded that the Bladex at issue was not applied under the instructions and control of a certified applicator within the meaning of section 2(e)(4) of the Act and 40 CFR § 171.2(28), Mr. Smith was aware of the availability, if needed, of Jerry Morris, a certified applicator, and Mr. Morris was, in fact, available, albeit at some distance. It is, therefore, concluded that the gravity of the harm or potential harm from the violation at issue here is slight.

This brings us to the gravity of the misconduct. The record, at a minimum, shows an inattention to detail on the part of Terra's Winfield office. Michael Reschly, temporary location manager at Winfield, apparently believed that the matter of actually obtaining the certifications or licenses from the State, including his own, was being handled by Terra's Sioux City office. Because a simple inquiry seemingly would have revealed the status of Brian Smith's certification application and such an inquiry should have been made prior to applying or directing the application of RUPs, Terra's culpability or oversight is greater than the respondent's in High Plains Cooperative, supra, where the stipulated facts were that Mr. Curtis was unaware his Wyoming certification had expired. As in High Plains Cooperative, a mitigating factor is that action to correct the omission was promptly taken after the fact Brian Smith

was not a certified applicator was called to Terra's attention. Under all the circumstances, a penalty of \$1,000 is considered appropriate and will be assessed against Terra.

Turning to Brian Smith, section 14(b)(4) of the Act provides that in construing and enforcing the provisions of the FIFRA, the act, omission or failure of any officer, agent or other person acting for or employed by any person shall in every case be deemed to be the act, omission or failure of such person as well as of the person employed.^{19/} Although the cited paragraph is under section 14(b) entitled "Criminal penalties," it is certainly indicative of the rule to be applied in assessing civil penalties.

The record reflects that Mr. Smith was fully qualified to be a certified applicator, and indeed, considered himself to be such. As in the case of Terra, the apparent slight drift onto Mr. Peterson's property cannot be related to Smith's failure to have a certified applicator's card or license. The record unsurprisingly indicates that after he had passed the test to become a certified applicator, the paperwork of applying for the applicator's card or license and payment of the required fee was left to his employer. The gravity of his misconduct is thus

^{19/} Section 14(b)(4) of the Act provides:

(4) Acts of officers, agents, etc.--When construing and enforcing the provisions of this subchapter, 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.

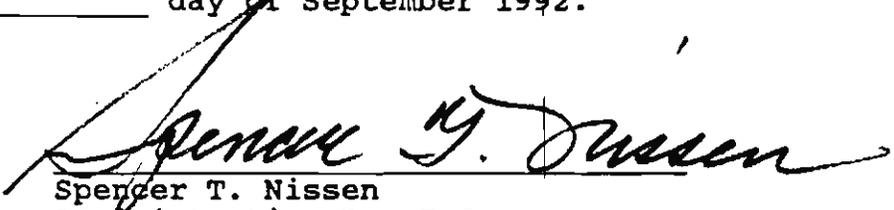
considered to be slight. There is no evidence of Mr. Smith's income or ability to pay. Under the circumstances, a penalty of \$50 is considered to be appropriate against Brian Smith.

O R D E R

It having been determined that Terra International, Inc. and Brian Smith have violated section 12(a)(2)(F) of FIFRA as charged in the complaints, a penalty of \$1,000 is assessed against Terra International, Inc. and a penalty of \$50.00 is assessed against Brian Smith in accordance with section 14(a)(4) of FIFRA (7 U.S.C. § 1361(a)(4)). Payment of the mentioned penalties shall be made by sending cashier's or certified checks payable to the Treasurer of the United States totaling \$1,050.00 to the following address within 60 days after receipt of this order:^{20/}

Regional Hearing Clerk
U.S. EPA, Region VII
P.O. Box 360748M
Pittsburgh, PA 15251

Dated this 3rd day of September 1992.


Spencer T. Nissen
Administrative Law Judge

^{20/} Unless appealed to the Environmental Appeals Board in accordance with Rule 22.30 of the Rules of Practice (40 CFR Part 22) or unless the Board elects sua sponte to review the same as therein provided, this initial decision will become the final decision of the Environmental Appeals Board in accordance with Rule 22.27(c). See 57 Fed. Reg. 5320 (February 13, 1992).

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
726 MINNESOTA AVENUE
KANSAS CITY, KANSAS 66101

IN THE MATTER OF)
)
TERRA INTERNATIONAL, INC. D/B/A) I.F.&R. VII-996C-90P
TERRA CHEMICALS INTERNATIONAL,) VII-995C-90P
INC., AND BRIAN SMITH)
) CERTIFICATION OF SERVICE
RESPONDENT)
)

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties... (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by the Honorable Spencer T. Nissen along with the entire record of this proceeding has been served on Ms. Bessie Hammiel, Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460; that a copy was hand-delivered to Counsel for Complainant, Rupert G. Thomas, Assistant Regional Counsel, Office of Regional Counsel, Environmental Protection Agency, Region VII, 726 Minnesota Avenue, Kansas City, Kansas; and that a copy was served by certified mail, return receipt requested on Counsel for Respondent, Mark A. Kalafut, Esq., Vice President and General Counsel, Terra International, Inc., 600 Fourth Street, Sioux City, Iowa 51101; and Robert R. Eidsmoe, Esq., Eidsmoe, Heidman, Redmond, Fredregill, Patterson & Schatz, 701 Pierce Street, Suite 200, P.O. Box 3086, Sioux City, Iowa 51102.

If no appeals are made within 20 days after service of this Initial Decision, and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. Section 22.27(c), and Section 22.30).

Dated in Kansas City, Kansas this 9th day of September, 1992.

Venessa R. Cobbs

Venessa R. Cobbs
Regional Hearing Clerk

cc: Honorable Spencer T. Nissen
Administrative Law Judge
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460