6/30/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Sav-Mart, Inc.,	)	**Docket No. FIFRA-09-0819-C-92-36**
	)	
Respondent	)	

Federal Insecticide, Fungicide, and Rodenticide Act -- Civil Penalty -- As properly proposed in the Complaint, Respondent's unlawful mixing and sale of a pesticide constituted four separate violations of the Act for calculating the civil penalty under EPA's 1990 Enforcement Response Policy; but the minor nature of any harm to health and the environment from the violations justified a reduction in the penalty to 25 percent of the statutory maximum.

Appearances

For Complainant:

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For Respondent:

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Before

Thomas W. Hoya
Administrative Law Judge

INITIAL DECISION

This Initial Decision determines the amount of the recommended civil penalty in this case, which has been brought under the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. §§ 136-136y ("FIFRA"). Complainant is Region IX, U.S. Environmental Protection Agency ("EPA"); and Respondent is Sav-Mart, Inc., an Arizona corporation that operates a supermarket in Buckeye, Arizona and also a branch supermarket in Gila Bend, Arizona.

The parties have stipulated that Respondent committed the violations of FIFRA charged in the July 14, 1992 Complaint. These violations concern the production and sale of a pesticide at Respondent's Buckeye store. What divides the parties, and presents the subject of this Initial Decision, is the amount of the appropriate civil penalty to be imposed under Section 14(a) of FIFRA, 7 U.S.C. § 136l(a). Complainant has proposed $20,000; Respondent has suggested either $3,000, or else simply a warning to be issued by EPA to Respondent.

Facts of the Case

This case stems from a September 18, 1991 inspection of Respondent's Buckeye store by State of Arizona environmental officials. The officials observed the pesticide diazinon for sale in ten used one-gallon laundry detergent bottles. Each of the bottles had a photocopy of a printed label for Diazinon Spray, an EPA registered pesticide, plus a handwritten statement that said "Premixed, Ready to Use, Guaranteed to Kill Bugs." One of the Arizona state officials bought two of the bottles. Complainant charged, and Respondent has admitted, that this situation involved four violations of FIFRA.

First, the sale to the Arizona state official violated Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), which prohibits the sale by "any person" of an unregistered pesticide.[1] (Evidently

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[1] This cited FIFRA section was stated in both the Complaint (Count I, ¶ 11) and in Complainant's Opening Brief (at 3, August 12, 1993) as making it "unlawful ... to sell or distribute a pesticide to any one who is not registered under Section 3 of FIFRA." Section 3 of FIFRA, 7 U.S.C. § 136a, however, provides for the registration of pesticides, not purchasers.

That Complainant actually intended to charge that the violation consisted in a failure to register the pesticide is suggested by its description of this count in its Response to Respondent's Opening Brief (September 13, 1993) at 3. Complainant there stated that "Count I charges the sale or distribution of an unregistered pesticide in violation of Section 12(a)(1)(A) of FIFRA," and cited as the required elements of proof a demonstration of the sale and

Respondent had not registered its premixed diazinon with EPA.)[2]

Second, the bottles of premixed diazinon had been prepared by Larry Eng, the President of Respondent, who had purchased Diazinon Spray, diluted it with water, and repackaged it in the used laundry detergent bottles. Such preparation made Respondent a "producer" under Section 2(w) of FIFRA, 7 U.S.C. § 136(w); and Section 7(a) of FIFRA, 7 U.S.C. § 136e(a) prohibits anybody from "producing" a pesticide without first registering his establishment with EPA. Respondent had not thus registered its establishment. Therefore Respondent transgressed Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L),[3] which declares it unlawful for any "producer to violate any of the provisions of section 136e."

Third, Mr. Eng diluted the Diazinon Spray at a ratio of four ounces of Diazinon Spray to one gallon of water. But, according to the label on the Diazinon Spray, the minimum dilution ratio required three gallons of water for each four ounces of Diazinon Spray. Therefore Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. 136j(a)(2)(G), which declares it unlawful "to use any registered pesticide in a manner inconsistent with its labeling."

Finally, the photocopied label on the premixed diazinon stated that the pesticide contained 48.72 percent of diazinon as the active ingredient. But a subsequent laboratory analysis of the

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of the absence of an EPA registration number from the label.

As noted (see the text supra, 2d paragraph), Respondent admitted the violations "as charged in the Complaint" (Stipulation of the Parties Regarding Liability, February 8, 1993). At any rate, the submissions by the parties suggest that Respondent did violate Section 12(a)(1)(A) of FIFRA by selling an unregistered pesticide, and any possible miswording in the Complaint and Complainant's Opening Brief do not affect the amount of the civil penalty recommended in this Initial Decision.

[2] The Complaint did not allege the lack of registration. As noted (see the text supra, 2d paragraph), Respondent has, however, admitted the violations "as charged in the Complaint" (Stipulation of the Parties Regarding Liability, February 8, 1993).

[3] Complainant's submissions generally cited this provision as Section 12(a)(1)(L) of FIFRA, 7 U.S.C. § 136j(a)(1)(L). But Complainant apparently intended Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), as cited in the text. There is no indication that Respondent was misled to its detriment. Moreover, the substantial reduction recommended by this Initial Decision in the civil penalty proposed by Complainant would be directed regardless of any problem with Complainant's statutory citation here, so neither party has been prejudiced by it.

premixed diazinon purchased by the Arizona state official revealed that it contained only 1.62 percent of diazinon as the active ingredient (presumably as a result of Mr. Eng's diluting.) Consequently, this premixed diazinon was "adulterated" under Section 2(c) of FIFRA, 7 U.S.C. § 136(c), a term that "applies to any pesticide if ... its strength or purity falls below the professed standard of quality as expressed on its labeling...." Respondent thus sold an "adulterated" pesticide, in violation of Section 12(a)(1)(E) of FIFRA, 7 U.S.C. § 136j(a)(1)(E).

Respondent conceded that these alleged violations of FIFRA did in fact occur, but explained that the whole situation arose in a relatively innocent manner. In its description of itself, Respondent is a small family business consisting of two stores in two Arizona desert communities. Larry Eng, according to Respondent, immigrated to this country from China, has a limited command of English, and is now semi-retired. While Mr. Eng is an officer and stockholder of Respondent, it is his children, stated Respondent, who run the business.

As explained by Respondent, Larry Eng obtained the Diazinon Spray to kill insects around the store and his house. To be thrifty with the Diazinon Spray that remained, Respondent said that Mr. Eng put it in the ten used laundry detergent bottles and offered it for sale with the xeroxed copies of the original label, unaware that he was violating any law.

Complainant dismissed Respondent's account of Larry Eng's actions as irrelevant. FIFRA is a strict liability statute, Complainant noted. Moreover, Complainant added, neither Mr. Eng's ignorance of the law nor his lack of intent to violate any law lessened the danger to the public created by his actions.

Arguments of the Parties

To justify its proposed $20,000 civil penalty, Complainant applied EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (July 2, 1990). In arguing for only $3,000 or just a warning, Respondent advanced essentially three contentions. First, Respondent claimed that the four violations constituted really only one offense for purposes of assessing the penalty.

Second, Respondent insisted that Complainant's computation of the penalty accorded insufficient weight to Respondent's innocent intentions and record of prior compliance, and to the absence of environmental harm. Third, Respondent asserted that Complainant's computation ignored Respondent's difficult financial situation.

Each of Respondent's contentions is reviewed below, the second and third in conjunction with a discussion of Complainant's application of the Enforcement Response Policy. This three part

review is followed by an overall evaluation of the appropriate penalty amount.

One Offense, or Four

In urging that Respondent's actions be considered only one offense for calculating the civil penalty, rather than four, Respondent emphasized that it was only a single set of interrelated actions by Larry Eng that gave rise to this whole case. Respondent further quoted the following statement from EPA's Enforcement Response Policy (at 26).

> A single event or action (or lack of action) which can be considered as two unlawful acts of FIFRA (section 12) cannot result in a civil penalty greater than the statutory limit for one offense of FIFRA.

Under FIFRA, the statutory limit for one offense is $5,000.

Complainant countered that whether the calculation should be based on one violation or four turns on whether each requires a different element of proof. In the instant case, Complainant asserted that each of the four violations does require a different element. As authority for applying this test, Complainant quoted the following sentences, also from EPA's Enforcement Response Policy (at 25).

> A separate civil penalty, up to the statutory maximum, shall be assessed for each independent violation of the Act. A violation is independent if it results from an act (or failure to act) which is not the result of any other charge for which a civil penalty is to be assessed, or if the elements of proof for the violations are different.

(emphasis added by Complainant)

Ruling. Complainant's analysis is correct. The position of EPA on this question was established in In the Matter of Holmquist Grain & Lumber Co., FIFRA Appeal No. 83-3, Final Decision (April 25, 1985). In that case, the respondent had initially mixed a registered pesticide with rolled oats to produce a pesticide for its own use, and then, to accommodate some customers, sold the produce to them without profit. The Respondent had registered neither its establishment with EPA nor its new pesticide, and the issue was whether it had committed one offense or two.

EPA's Chief Judicial Officer concluded as follows (at 3).

> The rule announced in Blockburger v. United States, 284 U.S. 299, 76 L.Ed. 306, 52 S.Ct. 180 (1932), and subsequently applied by the Supreme Court on numerous

other occasions [citations omitted] is controlling here:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not. (Blockburger v. United States, supra, 76 L.Ed., at 309.)

Subjecting the facts of that case to this test, the Chief Judicial Officer easily held that not one, but two offenses had been committed (at 4).

> [P]roof of pesticide production is required to prove an establishment registration violation, but not to prove a pesticide registration violation; and proof of a pesticide's unregistered status is required to establish a pesticide registration violation, but not to prove an establishment registration violation.

As to the instant case, the quoted reasoning demonstrates why Respondent's unregistered status as a pesticide producer and its unregistered pesticide are violations independent of each other. They are each also independent of the other two charges, as neither absence of registration is required to prove either of these other two.

The same uniqueness of a central element of proof is true as well for these two remaining charges. For the third violation, Larry Eng's dilution of Diazinon Spray in a ratio different from that prescribed by the label is an element of proof required only for that charge. Similarly, that Larry Eng's premixed diazinon had a strength or purity different from that stated on its label was an element of proof needed only for the fourth charge, selling an adulterated pesticide.

As to the quotations cited by the parties from EPA's Enforcement Response Policy, it is the one selected by Complainant that appears in the lead paragraph of that section of the Policy and that states the Policy's general rule. The quotation cited by Respondent is applied, in the two examples supplied by the Policy, to situations where only a single act is involved to a greater extent than is true of the instant case.

The first example was a sale of a product contrary to an EPA cancellation order; since a canceled product is no longer registered, this transaction constitutes also the sale of an unregistered product. But, according to EPA's Enforcement Response Policy, because only a single action is involved, only one offense will be charged. The second example suggested a product label that

is misbranded in one way or in ten ways. According to the Policy, in either event, it is misbranding on only one product label, and therefore represents only a single misbranding offense.

In the instant case, Respondent's violations consisted of four more distinct actions: failure to register its premixed diazinon; failure to register its establishment; dilution of the Diazinon Spray contrary to the label's directions; and sale of the premixed diazinon with a strength different from that stated on its label. Hence the rationale of the Enforcement Response Policy supports calculating Respondent's penalty on the basis of four separate offenses.

More significantly, EPA's position on Respondent's situation has conclusively been stated in Holmquist. That case both established the basic rule--that the test is the uniqueness of the elements of proof of each violation--and also actually applied it to two of Respondent's four offenses. Since, as described above, each of Respondent's four violations involves an element of proof required for that violation only, under the Holmquist test Respondent's civil penalty is to be based on four separate offenses.

Innocent Intentions, Prior Compliance, and No Environmental Harm

Respondent argued that Complainant's penalty calculation insufficiently considered that Larry Eng's motivations were innocent of any intention to violate the law, that Respondent's record is free of any past violations, and that Mr. Eng's actions actually caused no environmental harm. Complainant's justification of its proposed penalty was based, as noted, on EPA's Environmental Response Policy, which provides a procedure for considering each of these points raised by Respondent. Hence they will be reviewed here as part of reviewing Complainant's application of this Policy to this case.

The Policy establishes a five-step procedure for calculating a penalty. Respondent challenged Complainant's implementation of the last two steps: the fourth step, involving the considerations discussed in this subsection; and the fifth step, involving Respondent's financial situation and discussed in the following subsection.

In the first step, the so-called "gravity level" of each violation is determined from a listing of various FIFRA violations, ranging from a value of one for the most serious to four for the least serious. In this listing, each of Respondent's four violations is given a gravity level of two.

The second step concerns the size of a respondent's business, based on gross revenues during the preceding calendar year. Here

Respondent, with 1990 gross sales of $4 million,[4] is classified in the largest of three possible categories, which includes all those with gross revenues over $1 million.

The third step produces a dollar amount for each violation by using a matrix in which one axis reflects the gravity level of the violation, and the other axis reflects the three categories of respondent's size of business. For Respondent's gravity levels and size, the figure is $5,000 for each violation, which is the statutory maximum for any single violation of FIFRA.

In the fourth step, several adjustment factors are considered, including those that Respondent alleged were inadequately considered here. Each of these factors has two or more point values assigned to the different degrees in which it might be represented in any given violation. The more serious that the violation is made by that factor, the higher the point value.

Ruling. It is in the application to this case of this fourth step that Respondent's challenges become relevant. Respondent asserted that its innocent intentions and absence of prior violations were accorded insufficient weight overall. Nevertheless, Respondent did not dispute the values that Complainant proposed in this step for the adjustment factors of culpability (2) and compliance history (0).

Under the definitions of the Enforcement Response Policy, Complainant's proposed values for these two factors do seem correct. The same may be said of the value (1) that Complainant proposed for the toxicity of Respondent's pesticide. Respondent's innocent intentions and lack of prior violations factors will, however, be considered further in the second subsection below.

What merits more attention in this subsection are the values Complainant proposed for the two remaining adjustment factors: harm to human health (3) and to the environment (3). These values--representing a harm that is either "unknown" or potentially either "serious" or "widespread"--are generally tenable, because misuse of a pesticide can have major consequences.

But in the instant case, the particular facts suggest that a value of one--meaning a "minor potential or actual harm" (footnote omitted)--is justified. (The lower the numerical value assigned to each of these adjustment factors, the lower the civil penalty that results from the eventual calculation.)

The most likely harm would be that a purchaser would be misled by the photocopied label into thinking that the diazinon content of

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[4] Respondent's Reply Brief on Proposed Penalty, attachment of 1990 Corporation Income Tax Return, line 1a (September 9, 1993).

the pesticide was stronger than it actually was. The most probable result of this misunderstanding would be that any use of the pesticide would prove less effective than anticipated.

Since the total quantity offered for sale was only ten one-gallon bottles, the scale of any such unsatisfactory result would have been limited. And the fact that the sign advertising the pesticide as guaranteed to kill insects was hand lettered reduces the chances that a purchaser would have applied it to any especially sensitive use. In sum, a value of one for a minor harm to both human health and the environment seems warranted.

Decreasing the value assigned each of these two factors from three to one produces, under the Enforcement Response Policy, a reduction of 30 percent or $6,000 in Respondent's penalty. The penalty at this stage thus becomes $14,000.

Respondent's Financial Situation

Respondent's final argument was that its difficult financial situation justified a decrease in its penalty. The Enforcement Response Policy addresses such arguments in its fifth and last step, which mandates that a civil penalty generally not exceed a respondent's ability to pay. Complainant argued in this case, however, that Respondent had failed to support any penalty reduction on this ground.

Complainant's evidence was a Dun & Bradstreet report on Respondent. Respondent's chief evidence was copies of its federal income tax returns for the years 1989, 1990, and 1991, and a letter from a certified public accountant.

Respondent's tax returns show gross sales declining during these years from $4.5 million to $4.0 million to $3.7 million; and they show taxable income for these years of $29,560, ($126,453), and zero. The accountant's letter noted Respondent's declining sales during fiscal 1990-1992, and stated that Respondent "has had to reduce the pension and health benefits and cut payroll and other costs ... [and] Valley National Bank has canceled their credit line due to their weak financial statements and their probable inability to repay debt."[5]

Ruling. Respondent has documented a difficult financial situation. Nevertheless, as of September 30, 1991, Respondent had a net worth of $388,732 and a working capital of $75,278. These figures are solid enough to set Respondent apart from respondents

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[5] Respondent's Reply Brief on Proposed Penalty, attachment of November 10, 1992 letter from Walter H. Bowman, CPA, to Daniel W. McGovern, EPA, at 1 (September 9, 1993).

who in the past have been granted relief on financial grounds.[6] Therefore Respondent's financial problems fall short of what is required to reduce its penalty in this fifth and last step of applying the Enforcement Response Policy.

Overall Evaluation

A reasonable application of EPA's Enforcement Response Policy thus produces a civil penalty of $14,000. But this figure seems high. It is 60 percent of the statutory maximum--$5,000 for each of the four violations, or $20,000--yet the severity of Respondent's violations is strikingly modest.[7]

Most noteworthy is the absence of harm to human health or the environment. Not only was no harm done--the only bottles sold were the two bought by the Arizona state official--but the potential for harm was small. A total of only ten one-gallon bottles of the pesticide was prepared by Larry Eng. And the probable worst consequence for a purchaser of any of them would have been a less successful insect termination than expected.

Another mitigating factor is that Mr. Eng really engaged in just one set of actions. It is true that he violated four different FIFRA sections, and can justly be held to have committed four separate violations. But adding together individual dollar amounts for each of the four ends up with a total civil penalty that exaggerates the magnitude of what he did.

A further factor is Mr. Eng's innocent intentions and Respondent's record of no prior violations. Of course Mr. Eng's

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[6] See, e.g., In the Matter of Kay Dee Veterinary, FIFRA Appeal No. 86-1, Order (October 27, 1988) (respondent had negative net worth of $68,241, and incurred net losses of $163,123 in 1983, and $341,000 in 1984); In re Ray Birnbaum Scrap Yard, TSCA Appeal No. 92-5, Final Decision (March 7, 1994) (respondent had net worth of $20,000); In the Matter of Chem Mark of Reno, Docket No. FIFRA-09-0823-C-92-40, Initial Decision (December 7, 1993) (respondent's monthly expenses exceeded income by more than $1,500) In the Matter of Custom Chemical & Agricultural Consulting, Inc. and David H. Fulstone II, FIFRA Appeal No. 86-3, Final Decision (March 6, 1989) (respondent's business had incurred losses from past several years, and respondent's net worth was approximately $19,204).

[7] A similar observation was made by the court reviewing a penalty imposed by the EPA under FIFRA in Katzson Bros., Inc. v. U.S. EPA, 839 F.2d 1396, 1401 (10th Cir. 1988): "Considering Katzson Brother's spotless prior compliance record and the lack of harm caused to the environment by the violation, we question EPA's judgment in assessing a fine that is only $800 less than the maximum penalty amount."

ignorance of the law does not excuse his actions. But the context of his violations suggests that a lesser civil penalty is needed to achieve deterrence--the purpose of civil penalties--than would be true if his actions and Respondent's past record indicated a more cavalier attitude toward compliance.[8]

Section 14(a)(4) of FIFRA, 7 U.S.C. § 1361(a)(4), appears to contemplate a situation similar to this case.

> Whenever the Administrator finds that the violation ... did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty.[9]

In that same vein, Section 9(c)(3) declares as follows.

> Nothing in this subchapter shall be construed as requiring the Administrator to institute proceedings for prosecution of minor violations of this subchapter whenever he believes that the public interest will be adequately served by a suitable written notice of warning.

For the instant case, Complainant has decided that a civil penalty rather than a mere warning is warranted. That decision is supportable. Misuse of a pesticide is a serious matter that can risk major harm to human health and the environment. In addition, maintaining the integrity of the law often can justify the imposition of some sanction.

As to the sanction for this case, a reduction of the civil penalty to 25 percent of the maximum, or $5,000 for all four violations together, seems appropriate.[10] That amount should be

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[8] See In the Matter of South Coast Chemical, Inc., FIFRA Appeal No. 84-4, Order Reversing and Remanding Initial Decision (March 11, 1986) at 5 n.5: "FIFRA's civil penalty provisions must be viewed as remedial in nature and not punitive."

[9] EPA's Enforcement Response Policy is inconsistent with this FIFRA sentence, which provides in full as follows "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." But the Policy (Table 3, at 22) is structured so that a warning is authorized only if both an exercise of due care and an absence of significant harm are present.

[10] See In the Matter of Custom Chemical & Agricultural Consulting, Inc., and David H. Fulstone II, FIFRA Appeal No. 86-3, Final Decision (March 6, 1989) at 15: "The [FIFRA penalty]

enough to inspire Respondent to attend more carefully to its compliance in the future, and enough to deter any carelessness on the part of other similarly situated parties. Accordingly, the recommended civil penalty is $5,000.

Order[11]

For the violations charged in the Complaint, Respondent is assessed a civil penalty of $5,000.

Payment shall be made by forwarding a cashier's check or certified check, indicating the name and docket number of this case, and payable to the "Treasurer, United States of America" to

EPA -- Region IX
(Regional Hearing Clerk)
P.O. Box 36083M
Pittsburgh, PA 15251

Thomas W. Hoya
Administrative Law Judge

Dated: June 30, 1994

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guidelines were not drafted for strict application, but instead reveal an intent that they be applied flexibly so as to serve the interests of justice."

[11] Pursuant to Section 22.27(c) of EPA's Consolidated Rules of Practice, 40 C.F.R. § 22.27(c), this Initial Decision "shall become the final order of the Environmental Appeals Board within forty-five (45) days after service upon the parties and without further proceedings unless" it is appealed by a party to the Board or the Board elects, sua sponte, to review it. Under Section 22.30(a) of the Consolidated Rules, 40 C.F.R. § 22.30(a), the parties have twenty (20) days after service upon them of this Initial Decision to appeal it. The address for filing an appeal is as follows.

Environmental Appeals Board
U.S. EPA
Weststory Building (WSB)
607 14th Street, N.W., 5th Floor
Washington, DC 20005