

4/14/94

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
James C. Lin and Lin)	
Cubing, Inc.,)	Docket No. FIFRA-09-0826-C-93-01
)	
Respondent)	

INITIAL DECISION

FIFRA, section 14(a) - Label direction that restricted-use pesticide be applied by a certified applicator requires that applicator be certified by State where the application is made.

FIFRA, section 14(a) - The application of a restricted-use pesticide to an agricultural product loaded in containers for transit to another place is not an application made for purposes of producing the product and the applicator is not a private applicator within the meaning of FIFRA.

Appearances: Jon Ludwig, Esq.
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Reno, Nevada 89501
Attorney for Respondents

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U.S. EPA Region IX
75 Hawthorne Street
San Francisco, California 94105-3901
Attorney for Complainant

OPINION

This is a proceeding upon an administrative complaint issued by the EPA under the Federal Insecticide, Fungicide and Rodenticide Act, as amended, ("FIFRA"), section 14(a), 7 U.S.C. 1361(a) against Respondents James C. Lin and Lin Cubing, Inc.¹

The complaint stems from an inspection of Respondents' facility located in Fernley, Nevada, on February 21, 1991. Respondents are alleged to be commercial applicators and are charged with the following violations discovered as a result of that inspection:

Counts I - VIII of the complaint charge that in eight different instances Respondents violated FIFRA, section 12(a)(2)(F), 7 U.S.C. 136j(a)(2)(F), in that Respondents applied the restricted-use pesticide GASTOXIN to containers of hay at the Facility when no one at the facility was qualified as a certified applicator.

Counts IX-XII charged Respondents with four separate violations of FIFRA, section 12(a)(2)(G), 7 U.S.C. 136j(a)(2)(G), in that Respondents contrary to the labelling requirements stored GASTOXIN in an area that was not posted, did not have warning signs posted on all sides of the fumigated truck trailer, did not have a full-face gas mask phosphine canister combination at the application site and transported the hay over public roads and

¹ This proceeding was originally assigned to former Chief Administrative Law Judge Frazier, who, by order dated December 22, 1993, reassigned the case to the present presiding officer.

highways without aeration.

A penalty of \$60,000 (\$5,000 per violation) was requested.

Respondents answered denying the violations. As affirmative defenses, Respondents alleged that a full-face gas mask was not required, that Respondent Lin Cubing believes that no containers were transported without the required aeration, and that Respondents are not commercial applicators but "private applicators" within the meaning of FIFRA, section 14(a), 7 U.S.C. 1361(a), and did not receive a written warning from the EPA or a citation for a prior violation before the initiation of this proceeding.

At a hearing in this matter held on October 13, 1993, the case was submitted on a stipulation of facts.² Posthearing briefs were then filed. This initial decision is rendered on consideration of the stipulated facts, the documents submitted and the other matters of record in this proceeding.³

The Facts

The following pertinent facts are found:

Respondent Lin Cubing, Inc. is a Nevada Corporation and

² Transcript of hearing, hereafter Tr."

³ Complainant's motion to amend Complainant's prehearing exchange, filed subsequent to the hearing, is denied. Complainant has offered no explanation for why it waited until after the hearing to proffer these documents. Respondents assert, and Complainant has not denied, that Mr. Moses, whose memorandum of May 24, 1991, Complainant now wants to add, was present at the hearing. Complainant elected not to call Mr. Moses to testify, subject to cross examination, but, instead, stipulated to the facts. Complainant cannot now circumvent Respondents' right of cross-examination by obtaining admission of Mr. Moses' memorandum at this stage.

Respondent James C. Lin is a shareholder and President of Lin Cubing, Inc.⁴ On February 21, 1991, Respondents' place of business in Fernley, Nevada, was inspected by Charles Moses of the Nevada State Department of Agriculture to determine whether Respondents were using or had used pesticides in compliance with FIFRA.⁵

Following the inspection, James Lin's application records were obtained by Mr. Moses. These records disclosed that in nine instances between September 1990 and April 1991, James Lin had applied 50-75 pellets of the restricted-use pesticide GASTOXIN to containers (semi tractor-trailers) loaded with alfalfa cubes to within 6 inches of the rear doors of the containers.⁶

The label directions for GASTOXIN state that it is for "use only by Certified Applicators . . . or persons trained in accordance with the attached product manual working under the direct supervision and in the physical presence of the Certified Applicator who must be available on site or on the premises."⁷

Prior to March 29, 1991, James Lin was not certified as a restricted use pesticide applicator by the State of Nevada. He was,

⁴ Respondent's proposed findings of fact ("RPF") Nos. 1 and 2.

⁵ Complaint, par. 16, admitted by Respondents; see also Inspection Notice attached to Complainant's prehearing exchange. Documents submitted by the parties prior to the hearing as part of their prehearing exchanges have been admitted into the record by agreement of the parties. Tr. 7, 9.

⁶ Respondent's prehearing exchange, Exhibit 1; Stipulation, Tr. Exhibit A.

⁷ Labeling submitted by Complainant and stipulated to as the labeling accompanying the product at the time it was applied. Tr. 8.

and had been since approximately 1980, a certified applicator in the State of California.⁸

James Lin became certified as a restricted-use applicator by the State of Nevada on March 29, 1991.⁹

Other use precautions specified in the labeling were that approved respiratory protection must be worn during exposure to concentrations in excess of permitted levels or when concentrations are unknown; a full face gas mask must be available at the site of application except for an application outside the area to be fumigated; entrances to the fumigated area must be placarded with a prescribed warning sign that is not to be removed until the treated commodity is aerated down to 0.3 ppm or less; and the area where the pesticide is stored must be posted.¹⁰

The containers/tractors were outdoors when the restricted-use pesticide was applied. No gas masks were worn when GASTOXIN was applied to the containers.¹¹

Lin Cubing personnel did not enter the containers when the GASTOXIN was applied, not at any time thereafter.¹²

The containers were not placarded.¹³

⁸ Stipulation, Tr. Exhibit A.

⁹ Stipulation, Tr. Exhibit A.

¹⁰ Labeling, "Application Procedures" (hereafter "Product Manual"), p. 34, Par. I. 3; p. 35, Par J; p. 38.

¹¹ Stipulation, Tr. Exhibit A.

¹² Stipulation Tr. Exhibit A.

¹³ Tr. 8.

The applications of GASTOXIN were made in connection with the shipment of the alfalfa cubes to Japan.¹⁴

Discussion

James Lin Was Not a "Private Applicator" With Respect to the Application of GASTOXIN.

Under FIFRA, a private applicator is a certified applicator who uses or supervises the application of any restricted-use pesticide for purposes of producing any agricultural commodity on property owned or rented by the applicator or the applicator's employer.¹⁵ Any other person who uses or supervises the use of a restricted use pesticide is a commercial applicator.

A "certified applicator" is defined under FIFRA as "any individual who is certified under section 11 as authorized to use or supervise the use of any pesticide which is classified for restricted use."¹⁶

Thus, to be a private applicator, two requirements must be met: (1) The person must be a certified applicator, and (2) the application must be for purposes of producing an agricultural commodity on property owned or rented by the applicator or the applicator's employer.

The penalties that may be assessed against private applicators

¹⁴ Stipulation, Tr. Exhibit A. This finding is a reasonable inference from stipulated facts Nos. 7 and 11. It also appears to be consistent with Respondent's own arguments.

¹⁵ FIFRA, section 2(e)(2). A private applicator may also be a certified applicator who applies a pesticide on the property of another without compensation. Id.

¹⁶ FIFRA, section 2(e), 7 U.S.C. 136(e).

are more lenient than against commercial applicators. Commercial applicators, which is what the complaint alleged Respondents are, may be assessed a penalty of up to \$5,000 per violation.¹⁷ Private applicators are subject to a much smaller maximum penalty of \$1,000, per violation, and only if the violation is subsequent to the applicator having received a written warning from the EPA or follows a citation for a prior violation.¹⁸

Respondents argue that James Lin's certification by the State of California satisfied the label's and statute's requirement that the application be by a certified applicator. Their argument is supported neither by the statute nor the regulations.

Under FIFRA, section 11, 7 U.S.C. 136i, States are authorized to have their own plans for certifying applicators. State plans must be approved by the Administrator of the EPA and must meet certain minimum requirements. If the State does not have an approved certification plan, the EPA, in consultation with the Governor of the State shall conduct its own program.¹⁹ While States are required to have certain minimum standards, they may impose more rigorous requirements. State plans may relate to reciprocity with other States for the acceptance of certified applicators, but those plans must also meet certain requirements including enforcement procedures that cover out-of-State applicators

¹⁷ FIFRA, section 14(a)(1).

¹⁸ FIFRA, section 14(a)(2).

¹⁹ FIFRA, section 11.

determined to be competent and certified within the State.²⁰

It is clear that the statute is designed to place control over certification of restricted-use pesticide applicators in the hands of the State with the EPA to step in only where the State has not acted or does not have an acceptable plan. While private applicators are treated more leniently than commercial applicators under the statute, the standards for certification are still to assure that the applicators are competent to use and handle restricted-use pesticides for the purposes for which private applications can be made.²¹ State control can only be exercised over applications within the State's boundaries.

Under Respondents' interpretation, however, States would have little control over their own certification requirements with respect to private applications within the State. An applicator certified by another State would not need to apply for certification by the State where the pesticide was applied. The provision for a Federal plan for any State where there is no approved State plan would be rendered largely superfluous. Finally, Respondents' interpretation would write out of the regulations the provisions relating to reciprocity arrangements with other States.

Statutes and regulations are to be construed, if possible, to give effect to all their provisions.²² An interpretation that so

²⁰ 40 C.F.R. section 171.7(e)(6).

²¹ See 40 C.F.R. section 171.5.

²² Natural Resources Defense Council v. U.S. E.P.A., 822 F. 2d 104, 113 (D.C. Cir. 1987).

weakens the authority of a State given by statute and regulation to regulate applicators within its boundaries is clearly inconsistent with this principle.

Admittedly, the wording on the label does not specifically say that the applicator must be certified in the State where the pesticide is applied. This, however, does not lend any support to Respondents' position. The wording merely incorporates the language in the Statute and the regulations.²³ If Respondents are knowledgeable enough about the legal requirements to be certified in California, they should also be knowledgeable enough to understand that the label is to be read in conformity with FIFRA and the regulations and that the assumption that the California certification authorized Mr. Lin to apply restricted-use pesticides outside California was a strained and unjustified interpretation of the law.

Even under Respondents' interpretation of the label, Respondents were not private applicators within the meaning of the Statute. The application was made to alfalfa that was loaded on a semi tractor-trailer apparently for export to Japan.²⁴ A private applicator is defined as a certified applicator who uses or supervises the use of any restricted use pesticide "for purposes of producing any agricultural commodity" on property owned or rented by the applicator or the applicator's employer. An application

²³ FIFRA, section 3(d)(1)(C), 7 U.S.C. 136a(d)(1)(C); 40 C.F.R. 156.10(j)(2)(i)(B).

²⁴ Supra at p. 6.

made to an agricultural commodity loaded for transit to another place is not an application made for the purposes of producing the commodity and the applicator is not a private applicator within the meaning of the statute.²⁵

Count VIII of the complaint, however, must be dismissed. That count alleges an illegal application of GASTOXIN by Respondents in April 1991. The burden of proving that the application was not done by a properly certified applicator or under his supervision rests with Complainant. It is stipulated that James Lin did become certified by the State of Nevada as a restricted use applicator on March 29, 1991. The record sheet for restricted use applications of GASTOXIN lists James Lin as the certified applicator or supervisor of the application made in April 1991.²⁶ Under the circumstances, it is the Complainant's burden to show that Mr. Lin was not present and Complainant has not done so.²⁷

Respondents have stipulated that no gas masks were worn when GASTOXIN was applied but dispute that they were required to have a gas mask available. The pertinent provisions of the labeling read as follows:

Respiratory protection need not be available for application from outside the area to be fumigated such as the addition of tablets or pellets to automatic

²⁵ Odessa Union Warehouse Co-Op, Inc., FIFRA Appeal No. 93-1 (EAB Order on Interlocutory Appeal, March 19, 1993).

²⁶ Respondent's prehearing exchange, Exhibit 1.

²⁷ Complainant refers to a memorandum by the EPA Inspector as evidence that Mr. Lin was not present at the application. This document was not included in the documents whose admission into the record was agreed to, and it cannot be considered. See supra, n. 3.

dispensing devices, etc., if exposures above the permitted exposure limit will not be encountered.

Here, the stipulated facts are that the containers were outdoors when the pesticide was applied and Lin Cubing personnel did not enter the containers when it was applied or at any time thereafter.

Again, the ultimate burden of showing that the label directions for respiratory protection were not complied with rests upon Complainant. The product manual indicates that respiratory protection is not required in all cases. The Enforcement Case Review relied upon by Complainant is not persuasive since it assumes that the applicator entered and placed the pellets on the floor of the trailer, which is contrary to the stipulated facts. Count XI of the Complaint, accordingly, is dismissed.

Count XII of the complaint, alleging that the container was not aerated, is also dismissed. Complainants again rely upon Mr. Moses' memorandum for proof of this violation. That memorandum, however, is not in the record and, therefore, cannot be considered.²⁸

In conclusion, Complainants are found to have committed the violations charged in Counts I - VII, IX and X, of the complaint. Counts VIII, XI and XII, are dismissed.

The Appropriate Penalty

Complainant asserts that the proposed penalty of \$60,000, is in accordance with the penalty calculations set out in the EPA's

²⁸ See supra, n. 3.

Enforcement Response Policy for FIFRA Violations, dated July 2, 1990.²⁹

With respect to Counts I - VII, I find that the potential for harm to human health and the environment was minor. Mr. Lin's California certification showed that he, at least, satisfied the minimum requirements for applying restricted-use pesticides.³⁰ Consequently, the potential injury present in having the pesticide applied by an incompetent applicator is not present here. The real harm lies in undercutting the State's own regulatory program for the certification of restricted-use applicators. I also find that the violation was not intentional but arose from Mr. Lin's negligent reading of the label as not requiring that the applicator had to be certified by Nevada. Accordingly, I would assign the value of 1 recommended by the Enforcement Response Policy for the factors of human and environmental harm and a value of 2 for culpability. This results in a gravity adjustment value of 6, meriting a 20% reduction in the matrix value, and results in a penalty of \$28,000, for Counts I - VII.

The penalty of \$5,000 per violation for the violations charged in Counts IX and X is properly calculated under the Enforcement Response Policy. No mitigating circumstances have been shown.

The total penalty assessed, accordingly, for the violations found herein is \$38,000. The financial data for 1991, for Lin

²⁹ The civil penalty calculation worksheet is attached to Complainant's prehearing exchange.

³⁰ State certification programs must conform to the Federal standards. See 40 C.F.R. 171.7(e).

Cubing, Inc., submitted by Respondents shows that the penalty is within Respondents' ability to pay and will not have a significant adverse affect upon Respondents' ability to continue in business. True, the penalty is somewhat more than the corporate operating net income for 1991 (which income is shown as being substantially reduced by a charge for depreciation), but the capital account appears large enough to cushion whatever adverse impact this may have on the corporation.³¹

ORDER³²

Pursuant to FIFRA, section 14(a)(1), 7 U.S.C. 1361(a)(1), a civil penalty of \$38,000, is assessed jointly and severally against Respondents James C. Lin and Lin Cubing, Inc.

Respondents shall pay the full amount of the civil penalty within sixty (60) days after this order has become final. Payment shall be made by forwarding a cashier's check or certified check in

³¹ Respondents have relied solely upon financial data for Lin Cubing, Inc. and have not submitted any separate financial data for James Lin. It is assumed that the financial data relating to the corporation can be taken into account in determining Mr. Lin's ability to pay the penalty as well as the corporation's, given the close connection between Mr. Lin and the corporation. See financial report attached to complainant's prehearing exchange.

³² Unless an appeal is taken pursuant to the Rules of Practice, 40 C.F.R. 22.30, or the Environmental Appeals Board elects sua sponte to review this initial decision, this initial decision shall become the final order of the Environmental Appeals Board. 40 C.F.R. 22.27(c).

the full amount payable to the Treasurer, United States of America,
at the following address:

EPA - Region 9
(Regional Hearing Clerk)
P. O. Box 360863M
Pittsburgh, PA 15251

Gerald Harwood

Gerald Harwood
Senior Administrative Law Judge

Dated: April 14, 1994.

