

As to the penalty, Complainant maintains that, evaluating the particular facts and circumstances of the alleged violations in light of the factors set forth in FIFRA § 14, and the EPA's FIFRA Enforcement Response Policy ("ERP"), a penalty in the amount of \$5,000 is appropriate in the instant case.

FINDINGS AND CONCLUSIONS

Liability

Consolidated Rule 22.20(a) provides for entry of an accelerated decision only where there are no genuine issues of material fact in dispute and the moving party is entitled to judgment as a matter of law. 40 C.F.R. § 22.20(a). Complainant urges that Respondent has admitted the allegations in the complaint, leaving no material facts in dispute, and that Complainant is entitled to judgment as a matter of law. Respondent has not opposed Complainant's motion.

Complainant presents the briefest of arguments in support of its motion. Complainant simply points to the letter Respondent submitted in response to the complaint and asserts that, because Respondent did not specifically deny the factual allegations made in the complaint, those allegations should be deemed admitted pursuant to Consolidated Rule 22.15, 40 C.F.R. § 22.15.⁽⁴⁾ Complainant observes that Respondent in its letter in answer to the complaint did not indicate when it filed its application for certification; that Respondent's president, Mr. Jackson merely asserts that due to some "confusion" its "application sat on someones [sic] desk at Des Moines" and was not processed until July 19, 1996; and that Respondent did not deny that the Furadan applications occurred as alleged in the complaint. Based on these admissions, Complainant urges that no material issues of fact remain in dispute and that Complainant is entitled to judgment as a matter of law.

Complainant adds that although Warren Jackson, President and owner of Respondent corporation, has told Complainant that the corporation has ceased to exist and therefore cannot be held liable, Bonanza Valley Aviation is still a registered corporation in the State of Minnesota and Mr. Jackson has submitted no documentation to the contrary.⁽⁵⁾ In support of its contention that Respondent continues to exist, Complainant submitted documents from the Minnesota Department of State. These documents include Respondent's articles of incorporation, which show the duration of the corporation as "perpetual," and a Notice of Change of Registered Office filed by Respondent in September 1996. Attachment D to Complainant's Motion. Complainant also submitted an undated report, apparently from Lexis, indicating that Respondent is still an active corporation. Id.

Respondent's letter in answer to the complaint does not directly respond to the factual allegations made in the complaint and those allegations are therefore deemed admitted by Respondent pursuant to Consolidated Rule 22.15(d). While Respondent's letter failed to respond to the factual allegations of the complaint, Respondent does offer what can be considered a defense to the violation charged. Respondent stated that, because it had been licensed in Iowa for several years and Minnesota, Respondent's home state which has reciprocity with Iowa, it was Respondent's understanding that it could begin applications of pesticide as soon as it arrived. Without any evidence to support its "understanding," however, Respondent's defense must be rejected.

In addition to Respondent's admissions, examination of documents submitted by Complainant with its motion and as part of its prehearing exchange, supports the charges leveled in the complaint. The reports and documentation provided by Kenneth Scott, a pesticide investigator with the Iowa Department of Agriculture and Land Stewardship ("IDALS"), consequent to his investigation of alleged pesticide misuse, support the allegations in the complaint relating to the time, place and identity of the pesticide applicator. CX 2-2F, 3-3C. In the course of his initial investigation and subsequent follow-ups at Twin-State Engineering and Chemical⁽⁶⁾ in Hampton, Iowa, Scott gathered documentation of the violations. Most significantly, he was provided with work orders covering each of the pesticide applications cited in the complaint and listing the applicator as Tom Kiefer c/o Bonanza Valley

Aviation. CX 2D and 3C. Also included in Scott's report are photos of a Furadan label, including the portion of the label where Furadan is identified as a RUP. CX 2F, photo 28.

The allegation that the Furadan was not applied by a certified applicator is supported by Respondent and Mr. Kiefer's commercial applicator licenses, both of which are dated July 19, 1996. Attachment A to Complainant's Motion. In addition, the license applications of Respondent and Mr. Kiefer indicate they were not received by IDALS until July 11, 1996, the day after the last application cited in the complaint. Id. These documents demonstrate that Respondent did not have the required certification at the time of the cited pesticide applications.

Respondent's admissions, and the documents submitted by Complainant, establish that no issues of fact remain in dispute and that Complainant is entitled to judgment as a matter of law on the issue of liability.

Penalty

Assessment of penalties for FIFRA § 12 violations is guided by FIFRA § 14. In determining the appropriate penalty, FIFRA § 14(a)(4) directs consideration of the size of the business charged, the effect on the person's ability to continue in business and the gravity of the violation.

In addition to the guidance provided by the statute itself, EPA has produced a FIFRA ERP to provide further guidance and to help ensure equitable treatment of violators. Computation of a penalty using the ERP is a five stage process. Stages one and two, respectively, involve a determination of the gravity, or level, of the violation, using appendix A of the ERP, and a determination of the size of the business. In stage three, the gravity of the violation and the size of the business are plotted on a matrix provided in Table 1 of the ERP to determine a base penalty amount. In stage four factors which may warrant an upward or downward adjustment to the base penalty amount are considered and given numerical values as provided in appendix B to the ERP. Table 3 of the ERP is then consulted to determine whether an upward, downward or no adjustment is warranted to the total gravity value. Stage five provides for consideration of the effect of the penalty on the violator's ability to continue in business.

Complainant proposes that a penalty of \$5,000 be assessed. Complainant addresses no argument to the issue of penalty in its motion. The penalty worksheet provided with the complaint makes it clear, however, that the penalty was calculated using the ERP. The worksheet offers the following calculation of Respondent's base penalty. As a commercial applicator, Respondent is subject to civil penalties under FIFRA § 14(a)(1) which provides for a maximum penalty of \$5,000 for each offense. A FIFRA § 12(a)(2)(F) violation is classified as level 2 in appendix A of the ERP. In the absence of any information provided by Respondent, its business is classified as size category 1, revenues of more than \$1 million per year.⁽⁷⁾ Plotting a level 2 violation committed by a category 1 business on the penalty matrix for FIFRA § 14(a)(1) yields a base penalty amount of \$5,000.

The penalty worksheet next addresses the gravity adjustment factors of pesticide toxicity, harm to human health, harm to the environment, violative history, and culpability. Furadan is classified as a toxicity category 1 pesticide because the warning language on its label says "Danger." A category 1 pesticide is given a pesticide toxicity gravity value of two. Harm to health and harm to environment were both classified by Complainant as minor, resulting in entry of a gravity value of one for each factor. Complainant assessed a gravity value of two for Respondent's violative history. This corresponds to a commercial applicator with one prior FIFRA violation. Under culpability Complainant assessed a gravity value of two for negligence. Respondent's total gravity adjustment value as calculated by Complainant was eight. Following Table 3, a value of eight warrants assessment of the base penalty with no upward or downward adjustment.

Respondent's answer to the complaint does offer arguments or defenses bearing on the issue of the appropriate penalty. Respondent maintains that, because it was

responding to a request for immediate help and because Respondent did go through the certification process as required, it was not negligent as indicated in the complaint. This argument is rejected. Respondent has been in the commercial pesticide application business since 1977 and should be well aware of the need to obtain certification before applying a RUP. It is reasonable and appropriate to characterize Respondent's failure to obtain certification before performing the applications cited in the complaint as negligent. Moreover, there is no support for Respondent's argument in the record. Respondent's argument that it "understood" it could begin applying as soon as it arrived in Iowa must also be rejected. Respondent has not produced any evidence or explanation to indicate why it "understood" that it would be allowed to violate FIFRA as it did.

Consideration of two additional factors included in the ERP but not accounted for in the penalty worksheet, voluntary disclosure and ability to pay, does not change the penalty amount. The facts show that this action was not initiated in response to Respondent's voluntary disclosure, but rather as a consequence of a citizen complaint and subsequent investigation by Smith of IDALS. As for ability to pay, although informed in the complaint of its right to have its financial condition considered in mitigation of the proposed penalty, Respondent has not raised it as an issue in this proceeding. Respondent's failure to raise its ability to pay as an issue constitutes a waiver of any objection to the penalty on ability to pay grounds. In re New Waterbury, Ltd., 5 EAD 529, 542 (Remand Order, EAB, Oct. 20, 1994).

Overall Complainant's penalty calculation is appropriate and supported by the facts. However, Complainant's assignment of a value of two under violative history, which indicates one prior violation, is without support in the record. Complainant has neither referred specifically to any previous FIFRA violation committed by Respondent, nor submitted documents showing a previous violation committed by Respondent. Lowering the value to zero, the value for a Respondent with no history of violations, reduces Respondent's overall gravity adjustment score to six. With a total of six points, Respondent is due a 20% reduction in penalty under the ERP. Consequently, Respondent's base penalty of \$5,000 will be reduced by 20%, or \$1000, for a total penalty of \$4,000.

ACCORDINGLY, IT IS ORDERED that Complainant's motion for accelerated decision as to liability and penalty IS GRANTED.

FURTHER, IT IS FOUND that that Respondent violated Section 12(a)(2)(F) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136j(a)(2)(F), when it aerially applied the pesticide FURADAN 4F INSECTICIDE - NEMATOCIDE in a manner not in accordance with FIFRA § 3(d), 7 U.S.C. § 136a(d).

FURTHER, IT IS ORDERED that, pursuant to Section 14 of FIFRA, 7 U.S.C. § 136l, Respondent is assessed an administrative penalty of \$4,000.

Payment of the full amount of the civil penalty assessed must be made within sixty (60) days of the service date of the final order by submitting a certified check or cashier's check payable to Treasurer, United States of America, and mailed to:

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

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

Failure by Respondent to pay the penalty within the prescribed statutory time frame after entry of the final order may result in the assessment of interest on the civil penalty. 31 U.S.C. § 3717; 4 C.F.R. § 102.13.

Pursuant to 40 C.F.R. § 22.27 (c), this accelerated decision will become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceeding unless (1) an appeal to the

Environmental Appeals Board is taken from it by a party to this proceeding or (2) the Environmental Appeals Board elects, sua sponte, to review this decision. If an appeal is taken, it must comply with § 22.30. A notice of appeal and an accompanying brief must be filed with the Environmental Appeals Board and all other parties within twenty (20) days after this decision is served upon the parties.

Edward J. Kuhlmann
Administrative Law Judge

November 20, 1998
Washington, D. C.

1. EPA Registration Number 279-2876.
2. Complainant represents that co-Respondent Mr. Kiefer has agreed to enter into a consent agreement and consent order. Accordingly, the liability and penalty determinations reached in this order relate only to Respondent Bonanza Valley Aviation, Inc.
3. The complaint alleges Respondent applied Furadan on the following dates to the following five locations in Iowa: on July 6 to Ron Sturgeon's 151 acre cornfield in Rowan; on July 7, to 272 acres of Harold Buseman's cornfield in Belmond; on July 7, to Mark Slining's 73 acre cornfield in Dows; on July 8, to Jerry Miller's 35 acre cornfield in Hampton; on July 10, to Paul Luebbers' 55 acre cornfield in Aredale.
4. Consolidated Rule 22.15(d) reads: "Failure of Respondent to admit, deny, or explain any material factual allegation contained in the complaint constitutes an admission of the allegation." 40 C.F.R. § 22.15(d).
5. Efforts by this office to reach Respondent's president and owner, Mr. Jackson, to inquire whether he intended to oppose Complainant's motion, and to learn whether there had been any change in the status of his corporation, were unsuccessful.
6. Twin-State Engineering and Chemical was named as a respondent in a separate action arising from the same set of facts. See I, F and R Docket No. VII-1314C-97P. That case was resolved by the entry of a consent agreement and consent order on May 27, 1998.
7. The ERP directs use of category 1 where Respondent has provided no information on the size of its business. ERP at 21.

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Last updated on March 24, 2014