UNITED STATES

ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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IN THE MATTER OF: LORTSCHER AGRI SERVICE, INC., RESPONDENT	I.F.& R. Docket VII-622C-85P

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT ("FIFRA" OR "THE ACT) - STATUTORY VIOLATION

1. An admitted sale of a restricted-use pesticide to a person or persons not certified as Certified Applicators and not subject to direct supervision of any person so certified violates Section 12 of the Act, 7 U.S.C. 136j(a)(2)(F).

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT - PENALTIES

2. "Gross Sales," as that term is used in determining an appropriate civil penalty under Agency Guidelines, is defined as "total revenues from all business operations" and Respondent's argument that the Agency should consider only chemical sales, made at the business location where the subject unlawful sale was made, was rejected as contrary to the express provisions of said Guidelines.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT - PENALTIES

3. Provisions in the Agency's Guidelines for Civil Penalty Assessment for reduction of the penalty amount where the penalty assessed will affect Respondent's ability to continue in business require that such effect be "significantly adverse" and does not necessarily intend that payment of such penalty can be made with facility.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT - PENALTIES - MITIGATION

4. Actions by Respondent, following Service of subject Complaint, to effectively prevent any recurrence of subject violation, while not evidence of good faith as to the instant violation, do indicate that good faith will be exercised as to future transactions and warrant reduction of a civil penalty otherwise appropriate.

FEDERAL INSECTICIDE, FUNGICIDE AND RODENTICIDE ACT - STATUTES

5. The primary purpose of civil penalty assessment, as provided by the Act and regulations promulgated pursuant thereto, is to achieve compliance with FIFRA and applicable regulations.

6. Gravity of any violation is determined by considering the potential that the act committed has to injure man or the environment and the severity of such potential injury along with the scale of use, the persons exposed and the extent of misconduct attributable to the violator.

APPEARANCES

For Complainant:

Anne Rowland, Attorney
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
726 Minnesota Avenue
Kansas City, Kansas 66101

For Respondent:

R. Gary Lortscher, President
Lortscher Agri Service, Inc.
Post Office Box 167
Oneida, Kansas 66522
and
Post Office Box 124
Bern, Kansas 66408-0124

INITIAL DECISION

By Complaint and Notice of Opportunity for Hearing, filed March 19, 1985, the United States Environmental Protection Agency (hereinafter "Complainant", "EPA" or "the Agency") charges Lortscher Agri Service, Inc., Oneida, Kansas (hereinafter referred to as "Respondent") with violation of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or "the Act"), 7 U.S.C., Section 136 et seq., alleging that Respondent, on June 28, 1984, sold two gallons of Paraquat, a restricted-use pesticide ("RUP"), to persons who were not applicators certified to use RUPs, and proposes a penalty of $5,000 for such violation.

Respondent, by its president, on April 3, 1985, filed its Answer to said Complaint, where a hearing is requested and Respondent contends that the penalty proposed is inappropriate because (1) the proper category of "Size of Business" had not been ascertained in that Respondent's total chemical sales were $42,316.06, and (2) Earl Edelman, the purchaser of the subject RUP, is employed by Respondent in Bern, Kansas.

The requested hearing was convened in the District Courtroom of the Nemaha County Courthouse in Seneca, Kansas, on August 7, 1985. The parties then and there stipulated to the following facts (Transcript [hereinafter "TR"] 4 and 5):

1. Respondent is a commercial applicator, dealer, retailer and distributor for the purposes of FIFRA 7 U.S.C. Section 136 et seq.

2. On or about June 28, 1985, Respondent violated Section 12(a)(2)(F) of FIFRA, 7 U.S.C. Section 136J(a)(2)(F) by making Paraquat, a restricted-use pesticide, available through sale to uncertified persons, Dan and Earl Edelman.

3. Earl Edelman applied the Paraquat purchased from Respondent to land owned by himself and his father Dan.

4. There was no known significant harm to health or the environment from this violation.

5. Section 14 of FIFRA, 7 U.S.C. Section 136L authorizes issuance of a penalty of up of $5,000 for each violation of Section 12(a)(2)F.

6. On March 19, 1985, Complainant issued a Complaint against the Respondent assessing a penalty of $5,000 for the violation cited in No. 2 above.

7. In assessing the penalty, Complainant used the "Guidelines for the Assessment of Civil Penalties under FIFRA" found at Federal Register ("FR") Vol. 39, No. 148, Wednesday, July 31, 1974, and further policy set out in the attachment to the June 11, 1981, memorandum from A.E. Conroy II, Director of Pesticides and Toxic Substances, Enforcement Division, EPA.

8. The argument that this penalty will cause Respondent to go out of business is an affirmative defense on which Respondent has the burden of proof.

The parties further stipulated (TR 5) that a restricted-use pesticide (Paraquat) was sold on June 28, 1984, to Earl and Dan Edelman; that neither of the purchasers were certified applicators; that the chemical sales for Lortscher Agri Service, Inc. for the year 1985, are between forty and fifty thousand dollars; that the total sales for Lortscher Agri Service, Inc., for the 12 months past are over $1,000,000 (one million dollars).

In addition to the facts stipulated to by the parties, the record further supports the following:

FINDINGS OF FACT

1. The label (C Exhibit [hereinafter "EX"] 1) states that "Paraquat" is a "Restricted Use Pesticide" and is "For Retail sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicators's Certification."

2. Said label contains the skull and crossbones danger symbol which is the highest level of caution on a pesticide label (TR 8) and bears the further warning: "One Swallow Can Kill!" in bold print along with the warning that said chemical is "harmful to the eyes and skin" (TR 8; C EX 1).

3. Earl Edelman, who made subject purchase of Paraquat from Respondent on June 28, 1984, stated (TR 15) that his principal occupation is farming; that he also works part-time (20 to 30 hours per week) at Respondent's Bern, Kansas, location (which does not sell "wet pesticides").

4. Earl Edelman and his father, Dan, farm "on shares" (TR 15) and employed Lortscher - Oneida to spray a field with Paraquat which they were going to "no-till plant". The said spray job "missed a few spots", whereupon Earl Edelman "went back and got two gallons of Paraquat and sprayed the spots . . . " (TR 16). The Paraquat was supposed to rid the field of anything green that was growing (TR 19).

5. Earl Edelman read the label (C EX 1) to find the amount of usage and followed the label instructions as to the amount of water and Paraquat to be mixed. He testified that he filled the tractor saddle tanks with water while in Oneida, Kansas, and does not remember if he placed the (Paraquat) in the water while at Oneida or if he put it in at the field (TR 18).

6. The sprayer rig consisted of the said saddle tanks with a boom on the back of the tractor (TR 18).

7. Respondent's employee John Weirs sold subject Paraquat to Earl Edelman who is not a certified applicator (TR 27); if Weirs explained that Paraquat was a RUP or mentioned the dangers of such use, Earl Edelman did not remember it (TR 17-18), nor does he recall receiving instructions from Bill Kuhlman (who did the said spray job), Weirs or anyone else (TR 20). He recalls that nobody accompanied him to his farm where he sprayed the "missed spots" (TR 21). John Weirs (a certified applicator) does not recall being asked for advice by Edelman or anyone else on June 18, 1984, as he was four days behind (TR 38) and very busy (TR 41).

8. June 28, 1984, was a late date for planting crops. Farming had been held up because of an "extremely wet spring" in 1984 (TR 22).

9. Earl Edelman used a chemical mask in the tractor cab during the application of Paraquat by him after his brother, Wayne, admonished him to use the mask, saying "that stuff will eat your lungs out, you'd better wear it" (TR 23). Said Wayne Edelman is not "certified" and was not present during the applilcation by Earl Edelman of subject Paraquat (TR 23).

10. Wayne Edelman has used Paraquat in previous years when it was, in each instance, applied by a Certified Applicator (TR 46).

11. Respondent's location at Oneida over 12 months has had gross sales exceeding $1,000,000 (one million dollars). Said location has five employees. The Bern location has more than five employees (TR 57).

12. Gary Allen Shepherd testified that he has worked for Respondent, at its Oneida, Kansas, operation, since March 22, 1985; that he keeps books

and does accounting; that Respondent lost $14,000 or $15,000 in 1984, and $11,000 in 1983; that his job is to try to make profitable the Oneida operation, which had gross income of over $1,000,000 (one million dollars) in 1984. He further stated that the loss figures did not include the Bern, Kansas, facility (TR 54), which he estimates does a comparable amount of business. It is his impression said Bern operation has been profitable (TR 56-57).

13. Shepherd further testified that, since his employment, Respondent has refused to sell RUPs to uncertified applicators; employee meetings have been held to promote safety and knowledge of RUPs, and Respondent has "done everything (it) can to avoid any inadvertent sale of RUP to any person who is not certified" (TR 55).

14. Dennis Droge has been an employee of Respondent at Bern since December, 1983, and states Respondent is posting information regarding Certification of Applicators, is distributing a monthly newsletter encouraging farmers to become certified and notifying the public of pesticides which are now or will become available only for restricted use (TR 59-60).

15. Since the filing of subject Complaint, Respondent has consistently refused to sell Paraquat or RUPs to persons not certified (TR 62; 66); however, the inspection by Daniel Tuggle (TR 27) indicated that at least one other person who was not a certified applicator was sold an RUP prior to receipt by Respondent of subject Complaint.

CONCLUSIONS OF LAW

1. It is stipulated that Respondent violated the Act by the sale of Paraquat, a restricted-use pesticide, to uncertified persons Dan and Earl Edelman (TR 4 - Stipulation, paragraph 2).

2. Earl Edelman, an uncertified applicator, mixed and applied said Paraquat to his farm land (TR 4) without supervision of any kind (Findings 5, 6 and 7).

3. Paraquat is a restricted use pesticide which is very toxic (Finding 2) and presents potential for serious injury (C EX 1, Finding 2).

4. Respondent's "gross sales" is defined as "total revenues from all business operations." On this record, Respondent's total gross sales from its business operation at both the Oneida, Kansas, and Bern, Kansas, operation exceeded $2,000,000 (two million dollars) (Finding 12).

5. Payment by Respondent of the penalty assessed will not, on this record, have a significantly adverse effect on its ability to continue in business, and it is not necessary or essential that such conclusion be supported by evidence that such payment can be made with facility.

6. The primary purpose of a civil penalty assessment is to achieve compliance with the Act by the Respondent and others similarly situated.

7. The actions of Respondent to effectively prevent recurrence of violation such as that shown by the record, while not evidence of good faith as to the instant violation, are an indication that good faith will be exercised as to future transactions and warrant mitigation of a civil penalty otherwise appropriate (Findings 13, 14 and 15).

8. An appropriate penalty which should be and is hereby assessed for the violation of the Act shown by this record is the total sum of $3,500.00.

DISCUSSION

In determining the amount of an appropriate civil penalty here to be assessed, we are governed by the Rules of Practice, 40 C.F.R. Part 22. Section 22.27(c) provides:

> "If the Presiding Officer determines that a violation has occurred, (he) shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of the civil penalty, and must consider the civil penalty guidelines issued under the Act. If (he) decides to assess a penalty different in amount from the penalty recommended to be assessed in the Complaint, (he) shall set forth in the initial decision the specific reasons for the increase or decrease . . . "

Section 22.35(c) provides further that there shall be considered, in addition to the criteria listed in 14(a)(4) of the Act, (1) Respondent's history of compliance with the Act . . . and (2) any evidence of good faith or lack thereof.

The Act provides, Section 14(a)(4), 7 U.S.C. Section 136 l(a)(4):

> "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 of the person's ability to continue in business, and the gravity of the violation . . . "

39 Federal Register, No. 148, Wednesday, July 31, 1974 (Guidelines for Assessment of Civil Penalties Under Section 14[a] of FIFRA), at pages 27711 and 27712, states that the Assessment Schedule categorizes potential violations on the basis of (1) the gravity of the violation and (2) the size of the business of the person charged, and that graduated penalties are set out in a matrix (using) these two factors.

The gravity of any violation is a function of (1) the potential that the act committed has to injure man or the environment; (2) the severity of such potential injury; (3) the scale and type of use anticipated; (4) the identity of persons exposed to a risk of injury; (5) the extent . . . of (violation); (6) the (Respondent's) history of compliance and actual knowledge of the Act, and (7) evidence of good faith in the instant circumstance.

As to the second factor, size of business, five size gradations are utilized. All five gradations or categories encompass or are based upon the amount of "gross sales", which is defined as "total business revenues from all business operations" (emphasis supplied). Category V encompasses all firms whose gross sales for the prior fiscal year, or in a representative 12-month period, exceeded $1,000,000 (one million dollars).

I find that the gravity of the violation is very high. The character of Paraquat is extremely toxic. One swallow can kill; breathing the spray, after mixture with water, can cause nose bleed or severe irritation to the skin and eyes (C EX 1). Therefore, the potential for injury is apparent. Respondent argues that certain formulations of Paraquat are "unclassified" and that the subject chemical, once applied, is no longer a chemical toxicant, and, therefore, the potential for injury is, at most, minimal. Such argument is rejected for the reason that it overlooks that the mixing and application both involve the potential for breathing or swallowing the vapors or mist and for the chemical coming into contact with the skin or eyes (C EX 1), and the potential for injury is heightened when the use of the chemical is by one "uncertified" and not directly supervised by another who is so certified. The testimony of Earl Edelman, who bought and applied Paraquat in the subject instance, demonstrates the potential for injury. He testified (TR 17):

> "Q.: Did you read this label?
>
> "A.: I imagine I read the label, as far as trying to find the amount usage . . .
>
> "Q.: Did they give you any advise . . . about the danger of Paraquat?
>
> "A.: I don't think so . . . "

Earl Edelman's older brother is not certified (TR 23) and hires a certified applicator when Paraquat is used. He told Earl (TR 23) that he'd "better wear" a chemical mask and said "that stuff will eat your lungs out." In spite of his brother's warning, Earl Edelman did not wear the mask the full time as "a chemical mask isn't too comfortable" (TR 24).

Respondent's argument, that the amount of chemical sales and net profit realized from such sales should be used to determine the category under the Guidelines for Assessment of Civil Penalties, being contrary to the express provisions of said Guidelines, should be and it is hereby rejected. Respondent was properly classified, as his "total business revenues from all business operations" was no less than $2,000,000 (two million dollars). He chose to present testimony only as to the Oneida, Kansas, operation, with no mention of Respondent's Bern, Kansas, operation. On this record, the Bern operation, which does not sell "wet pesticides" (TR 15), has been profitable (TR 56).

The record does reflect that Respondent has, since the instant Complaint was filed, taken action designed to prevent any sales of RUPs to persons "not certified" and has instituted a program to "certify" its employees and generally to inform its customers as to what chemical pesticides are registered only for restricted use (Findings 13-14). I find that this comports with the purpose of the Act - to achieve compliance - and that a reduction of the amount proposed, the maximum penalty authorized, is warranted.

In the premises, and on the basis of the entire record before me, I find that a civil penalty in the sum of $3,500.00 should be and it is hereby proposed.

ORDER 1/

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a)(1), 7 U.S.C. 136 1(a)(1), a civil penalty of $3,500.00 is assessed against Lortscher Agri Service, Inc., for violation of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the Service of the Final Order upon Respondent by forwarding a Cashier's check or Certified Check payable to the Treasurer, United States of America, to:

Mellon Bank
EPA-Region 7
(Regional Hearing Clerk)
Post Office Box 360748M
Pittsburgh, Pennsylvania 15251.

It is so ORDERED.

DATED: November 5, 1985

Marvin E. Jones
Administrative Law Judge

1/ Unless an appeal is taken pursuant to the rules of practice, 40 C.F.R. 22.30, or the Administrator elects to review this decision on his own motion, the Initial Decision shall become the Final Order of the Administrator (see 40 C.F.R. 22.27[c]).

CERTIFICATE OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, 726 Minnesota Avenue, Kansas City, Kansas 66101, the Original of the foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk (A-110), EPA Headquarters, Washington, D.C., who shall forward a copy of said Initial Decision to the Administrator.

DATE: November 6, 1985

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ