UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Bartlett and Company Grain,	)	Docket No. IF&R VIII-157C
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act. -- Where failure to follow label instructions on a restricted use pesticide (phostoxin) requiring that respirator and canister approved by Bureau of Mines be available for use and date of expiration for effective use of respirator and canister has passed constitutes a violation of Section 12(a)(2)(G) of FIFRA for which a civil penalty is appropriate.

Federal Insecticide, Fungicide and Rodenticide Act. -- Failure to maintain the records required by 40 CFR 171.11(c)(7) when using a restricted use pesticide (phostoxin) in a State where the Environmental Protection Agency conducts the certification program constitutes a violation of said regulation for which a civil penalty is appropriate.

Federal Insecticide, Fungicide and Rodenticide Act. -- Civil penalties assessed for failure to follow label instructions for use of a restricted use pesticide (phostoxin) and failure to maintain required records of such uses constitute violations of the highest magnitude.

APPEARANCES:

Byron N. Baker, Esquire
Suite 600
4800 Main Street
Kansas City, MO 64112

Counsel for Respondent

Teresa Lukas, Esquire
Jane Gardner, Esquire
Office of Regional Counsel
U. S. EPA, Region VIII
999 18th St.
Denver, CO 80202-2413

Counsel for Complainant

INITIAL DECISION

of

Honorable Edward B. Finch
Administrative Law Judge

This is a civil administrative Complaint issued on March 13, 1985 which instituted action against Respondent Bartlett and Company Grain, pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, (FIFRA) 7 U.S.C. 136 et seq. The Complainant is the U. S. Environmental Protection Agency (EPA), by Irwin L. Dickstein; Director; Air and Toxics Division; Region VIII, who has been duly authorized to institute this action. This proceeding is subject to the EPA Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits, 40 CFR 22.

The general allegations of the Complaint are, as follows:

° EPA has jurisdiction of this matter under Section 14(a) of FIFRA, 7 U.S.C. §136(1)(a).

° The Respondent, Bartlett & Company Grain, is a "person" within the meaning of Section 2(s) of FIFRA, 7 U.S.C. §136(s) and, thus, is subject to regulation.

° On August 21, 1984, Dan W. Bench, an authorized EPA inspector, conducted an inspection of the Respondent's facility in Eads, Colorado to determine compliance with FIFRA and its implementing regulations.

° Mr. Bench interviewed the manager of the facility, Mr. Don Koch, and examined and photographed protective equipment maintained at the facility for use during pesticide applications.

° The Respondent's manager reported that he had applied phostoxin, a registered restricted use pesticide, several days before the inspection. Inspection of equipment revealed that gas masks and canisters were available, as required by the label on phostoxin. However, the labels on the two canisters indicated that authorization for their use had expired three years earlier, in January and June, 1981.

° Section 12(a)(2)(G) of FIFRA, 7 U.S.C. §136j(a)(2)(G), prohibits the use of any registered pesticide in a manner inconsistent with its labeling. The Respondent's failure to maintain protective equipment in readiness for use during pesticide applications, as required by the phostoxin label, thus constitutes a violation of FIFRA.

° Inspection of the facility also revealed that the Respondent had not kept records of applications of phostoxin, which is a restricted use pesticide.

° EPA regulation, 40 CFR §171.11(c)(7) requires each firm employing a certified commerical applicator to keep complete records of applications of restricted use pesticides, including time, place, name and registration number of the pesticide, and the crop or commodity to which the pesticide was applied. By failing to keep records of phostoxin use at its facility, the Respondent violated the regulation and the recordkeeping requirement of FIFRA, Section 4(a)(1)[7 U.S.C. §136b(a)(1)].

Complainant has proposed that a civil penalty of $9,200.00 be assessed against Respondent for these alleged violations.

Respondent filed a timely Answer in which general denials were asserted with the exception being that it admitted the interview by Mr. Bench of the manager of the facility, Mr. Don Koch, and examined and photographed protective equipment maintained at the facility for use during pesticide applications.

Respondent further alleges that the proposed civil penalties of $5,000.00 and $4,200.00, respectively proposed by Complainant, do not consider the size of Respondent's business, the ability of Respondent to continue its business in light of the proposed penalty and the gravity of the alleged violation, that such proposed civil penalties are inconsistent with the EPA's "Guidelines for the Assessment Section 14(a); Citation Charges for Violations" (39 Fed. Reg. 27711 (1974)), and the proposed civil penalties are inappropriate, capricious and not consistent with the facts of the case.

Respondent further alleged that there was a deprivation of constitutional rights in that the EPA inspector failed to advise Respondent's employee, Donald Koch, of the purpose of the inspection or that he was entitled to have counsel present during any interrogation, all in violation of rights afforded Respondent by the Constitution of the United States.

An adjudicatory hearing was held in Denver, Colorado on May 14, 1986.

Findings of Fact

1. Respondent, Bartlett and Company Grain, is a corporation doing business in the State of Colorado.

2. Respondent operates a grain storage and merchandising facility in Eads, Colorado to which farmers (producers) deliver several kinds of grain.

3. On August 21, 1984, Mr. Dan Bench, an authorized EPA enforcement inspector, conducted an inspection of Respondent's facility in Eads, Colorado at which time a Notice of Inspection was issued by Mr. Bench and receipt acknowledged by Mr. Koch. (Complainant's Exhibits 1 and 2)

4. Respondent's manager, Mr. Donald W. Koch, applied phostoxin, a grain fumigant, to grain in storage in Respondent's facility in August, 1984. (Complainant's Exhibit 2)

5. Respondent's manager also applied phostoxin to grain stored in the facility on May 12, 1983. (Complainant's Exhibit 2)

6. Respondent generally uses phostoxin to fumigate grain in its facility whenever the grain is infested with insects, or between one and three times a year. (Tr., p 65)

7. Phostoxin is a registered pesticide, having the EPA registration number, 40285-3. (Complainant's Exhibit 6)

8. Phostoxin has been classified by EPA as a restricted use pesticide. (Complainant's Exhibits 6, 11 and 12)

9. The label for phostoxin requires that the applicator keep available a gas mask and canister approved by the U. S. Department of Interior, Bureau of Mines, for protection from phosphine gas. (Complainant's Exhibit 6)

10. Respondent's manager also stated that he uses Detia pellets to fumigate grain in Respondent's facility. (Affidavit of Donald W. Koch, attached as Exhibit 1 to Respondent's Motion to Dismiss, filed August 6, 1985.)

11. Detia is a registered pesticide, having the EPA registration number 2548-63. (Complainant's Exhibit 7)

12. Detia has been classified by EPA as a restricted use pesticide. (Complainant's Exhibits 7, 11 and 12)

13. The label for Detia requires that the applicator have available a gas mask and canister approved by the U. S. Department of Interior, Bureau of Mines, for phosphine gas protection. (Complainant's Exhibit 7)

14. During his inspection, the EPA inspector observed a container of the pesticide, "L" Fume at Respondent's facility.

15. "L" Fume a registered pesticide, having the EPA registration number 30574-1. (Complainant's Exhibit 8)

16. "L" Fume is also a pesticide classified by EPA for restricted use. (Complainant's Exhibits 8, 11 and 12)

17. The label for "L" Fume requires the applicator to keep gas masks and respirators available for use at all times for emergency use; such gas masks should be approved by the Mining Enforcement and Safety Administration.

18. The two gas mask canisters kept at Respondent's facility in Eads had expired, one in June and one in August, 1981. (Complainant's Exhibits 2, 5a, 5b, 5c and 5d)

19. The active ingredient in phostoxin, Detia and "L" Fume is aluminum phosphide, which produces phosphine gas on contact with moisture in the air. (Complainant's Exhibits 6, 7 and 8; Tr., pp 26, 27)

20. Exposure to phosphine gas creates various toxic effects in human beings, the most severe of which are pulmonary edema, coma, and death. (Complainant's Exhibit 13; Tr., pp 27-29)

21. The concentration of phosphine gas in a grain elevator during normal application of a pesticide containing aluminum phosphide would be high enough to constitute a lethal dose for a human being. (Tr., p 30)

22. An approved respirator (gas mask with canister) which fits properly would protect a person from the toxic effects of phosphine gas in a grain elevator. (Tr., p 32)

23. Residues of phosphine gas can remain for varying lengths of time after an application of a pesticide containing aluminum phosphide, before being completely dissipated into the atmosphere. (Tr., pp 32-33)

24. There is no antidote to phosphine gas poisoning. (Tr., p 34)

25. The only way to determine with certainty whether it is safe to re-enter a building after fumigation by phosphine gas is by using a chemical device to measure the concentration of the gas; odor is not a reliable indicator. (Tr., p 34)

26. The grain elevator at Respondent's facility in Eads, Colorado contains machinery with a number of moving parts for lifting the grain, filling the bins, and distributing pellets of pesticide, as well as an elevator for the employees. (Respondent's Exhibits 9 and 10; Tr., pp 65-66)

27. The dispenser for distributing pesticide pellets into the grain is located in the headhouse, at the top of the grain elevator. (Tr., p 67)

28. On occasion, Respondent's manager has dropped pellets of phostoxin on the floor of the headhouse while filling the dispenser. (Tr., p 91)

29. On occasion, Respondent's manager has returned to the headhouse to refill the dispenser with phostoxin pellets during the fumigation process. (Tr., pp 92-93)

30. Before purchasing a Draeger tube (gas measuring device), Respondent's employees relied on the odor of the phosphine gas to determine when it was safe to re-enter the grain elevator. (Tr., p 94)

31. Respondent's manager, Donald W. Koch, is and was at all times pertinent to this proceeding, a certified commercial applicator. (Complainant's Exhibit 2; Respondent's Exhibit 1)

32. Respondent did not maintain a record of the application of phostoxin in August, 1984.

33. Dun and Bradstreet reported over one million dollars ($1,000,000) in annual sales in 1984. (Complainant's Exhibit 10, Tr., p 48)

34. Respondent operates fourteen grain elevators, including the facility in Eads, Colorado which stores or processes several hundred thousand bushels of grain per year. (Tr., p 96)

35. For failing to follow label directions and failure to maintain records, Respondent is liable for the assessment of a civil penalty.

At the time of the violation charged, as well as at the time of the EPA inspection and the resulting enforcement action against Respondent, the State of Colorado did not have an approved pesticide applicator certification program in place. Colorado received approval for its certification program and the program became effective on July 25, 1985. 50 Fed. Reg. 31919 (August 7, 1985). Prior to that date, therefore, EPA conducted a federal certification program for pesticide applicators, and the requirements of 40 CFR §171.11 were applicable to certified applicators in Colorado.[1]

1/ Whatever effect the Accelerated Decision in Tierra Verde Company, Inc., IF&R IX-0422-C-85-1 (December 2, 1985) might have on a case similar to Bartlett's in a state with an existing certification program, that decision does not apply in this instance.

This case stems from an administrative Complaint filed on March 20, 1985. The Complaint charges Respondent with two violations of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA): misuse of a registered pesticide and failure to keep records of use of a restricted use pesticide. The first charge is brought directly under FIFRA; the second charge is brought under 40 CFR §171.11, the regulatory provision governing the federal certification of pesticide applicators in states where there is no state certification plan in effect.

Section 12(a)(2)(G) of FIFRA provides that "it shall be unlawful for any person --. . .to use any registered pesticide in a manner inconsistent with its labeling." 7 U.S.C. §136j(a)(2)(G). The label for phostoxin, a registered pesticide, requires users to "[k]eep available gas maks and canister carrying the approval of the U. S. Department of Interior, Bureau of Mines, for phosphine protection." (Complainant's Exhibit 6) The labels for the similar pesticides, Detia and "L" Fume, which are also formulations of aluminum phosphide, contain the same requirement. (Complainant's Exhibits 7 and 8)

There is no question that the required equipment at Respondent's facility in Eads was outdated: the canisters for the gas mask had expired in 1981, three years before the inspection. (Complainant's Exhibits 5a, 5b, 5c and 5d) Therefore, the canisters were no longer approved by the Bureau of Mines and were no longer "available" to be used for phosphine protection. Any applications of phostoxin after 1981 and before the EPA inspection on August 21, 1984, would have been inconsistent with the label requirement, thus constituting

a misuse of the product. Similarly, any applications of Detia of "L" Fume during that period would violate the label requirement as well.

Respondent did not refute that its manager, Donald W. Koch, applied phostoxin to grain in storage in its facility in August, 1984. This allegation is well-established in the record of this proceeding. (Complainant's Exhibit 2) Furthermore, Mr. Koch admitted to an earlier application of phostoxin in May, 1983. (Complainant's Exhibit 2; Tr., p 62) Finally, the record supports the conclusion that there were other applications of phostoxin--or Detia or "L" Fume--at Respondent's facility between the latest expiration date of the canisters, June, 1981, and the EPA inspection in August, 1984: Mr. Koch testified that as a general practice he uses phostoxin to fumigate grain for Respondent whenever the grain is infested with insects, approximately one to three times a year. (Tr., pp 65 and 89) Mr. Koch was unable to recall by adequate records specifically how many times he used phostoxin.

It is clear, then, that more than one incident of misuse of phostoxin is involved here. The pesticide at issue is not only a registered pesticide; it is also classified for restricted use due to its toxic effects on human beings. (Complainant's Exhibits 11 and 12)

Complainant does not have proof that anyone was poisoned as a result of these improper applications. Proof of harm is not necessary to establish the fact of violation or to assess a penalty under FIFRA. There is, however, ample proof of the potential for harm resulting from Respondent's failure to maintain a proper gas mask and canister, as will be developed in

the discussion of the proposed civil penalty. At this point in the discussion, it is enough to note that the record thoroughly demonstrates the danger of exposure to phosphine gas, the active component of phostoxin. (Complainant's Exhibit 13) The record further supports a conclusion that Respondent ran a grave risk of exposing its employees to the toxic gas without adequate safety equipment for use in the event of an emergency or equipment malfunction.

Respondent raises the question of the presence of a canister other than the one required during the application of phostoxin.

Respondent asserts that during all relevant times, it used a fumigant in pellet form manufactured by Degesch America, Inc. and sold under the trademark or trade name Phostoxin. Complainant introduced one label of Degesch Phostoxin which was registered with EPA (EPA Ex. 6). Respondent introduced a different Degesch Phostoxin label which was also registered with EPA (Resp. Ex. 14). No evidence was presented that these were the only formulations of such product so registered. The label presented by Complainant's Exhibit 6 requires the availability of a gas mask but the label represented by Respondent's Exhibit 14 does not include such a requirement.

It is difficult to imagine how this claim can be supported. Observing the two phostoxin labels carefully, it is obvious that they are labels for the same pesticide, not for two different forms of phostoxin: both labels supply the same EPA registration number and the same patent number. What distinguishes the two labels is the use to which the phostoxin is to be put.

The record establishes that Respondent used phostoxin as a fumigant to control insects in grain. The record also establishes that the applicator must keep a gas mask available for this use. Respondent has never asserted that it used phostoxin to kill animals in burrows. Nor is Respondent's facility an orchard or "noncrop area." The fact that phostoxin may be used to kill moles in orchards without a gas mask being available is completely irrelevant.

Complainant has proved that Respondent fumigated grain with phostoxin after the gas mask canisters expired. Therefore, Respondent has been shown conclusively to have violated the label requirements for phostoxin and, thus, to have violated Section 12(a)(2)(G) of FIFRA.

The EPA regulation in effect at the time of Respondent's use of the restricted use pesticide, phostoxin, in August, 1984, provides that "each firm employing a certified commercial applicator. . .shall keep and maintain at their principal place of business true and accurate records of the use of restricted use pesticides." 40 CFR §171.11(c)(7). Such records must contain information about the location of the pesticide application, the target pest(s), the specific crop or commodity which was treated, the trade name and EPA registration number of the pesticide, and the amount used.

This requirement was promulgated under the authority of Section 4(a)(1) of FIFRA, 7 U.S.C. §136b(a)(1), which provides that in states where EPA conducts the applicator certification program, EPA may require persons engaging in the commercial application of restricted use pesticides to keep certain records concerning such commercial applications. At all times pertinent to

this proceeding, EPA conducted the certification program in the State of Colorado. Therefore, the recordkeeping requirement, 40 CFR §171.11(c)(7), was applicable to Respondent.

Complainant did not join Mr. Koch in the Complaint, although he was responsible for keeping records of his applications; the only records for use of restricted use pesticides which Respondent was required to keep, and which are at issue in this proceeding, are records for applications at the Eads facility after June 24, 1984, the enforcement date for the amended regulation. Therefore, it is Respondent's failure to keep a record of the August, 1984 application of phostoxin which is the substance of Count II.

There is no question that Donald Koch, the manager of Respondent's facility, was a certified commercial applicator at the time of the phostoxin application (Complainant's Exhibit 2; Respondent's Exhibit 1; Tr., p 75). Nor is there any doubt that Mr. Koch made a commercial application of phostoxin in August, 1984, after the effective date of the amended regulation. (Complainant's Exhibit 2) The record further shows that Mr. Koch applied the restricted use pesticide to grain stored in the facility as part of his duties as manager, without keeping a "true and accurate" record of the application. Mr. Koch admitted as much to the EPA inspector, (Complainant's Exhibit 2; Tr., p 14). He certainly did not show any such records to the inspector when asked about them. (Tr., p 63) Indeed, Mr. Koch testified directly that since the inspection, he has changed his manner of operation of the facility by now "keeping records." (Tr., p 74)

Any notations concerning pesticide applications which Mr. Koch may have made on a blackboard would not have satisfied the recordkeeping requirement, even if he had made such notations for the August, 1984 application and not only for the May, 1983 application as indicated by his testimony. (Tr., pp 62-63.) First, such notations, if they existed, did not contain the complete information required by §171.11(c)(7): Mr. Koch testified only that he wrote down the date, crop, test weight (presumably of the grain), moisture, and "dockage." (Tr., p 63) This information would not satisfy the specific requirements of the regulation.

Furthermore, a notation on a blackboard, by its nature, is not a permanent record, since it may be easily erased. Mr. Koch testified that such notations were "removed" when the grain which had been treated was transferred or sold (Tr., p 88). Finally, even Respondent recognized that such notations did not qualify as records of pesticide use; otherwise, Mr. Koch would certainly have shown the EPA inspector the blackboard.

It is clear, then, that Respondent failed to comply with the recordkeeping requirement for the commercial application of phostoxin in August, 1984. Therefore, Respondent violated 40CFR §171.11(c)(7) and Section 4(a)(1) of FIFRA.

A civil penalty should be assessed against Respondent. A substantial penalty is necessary to draw Respondent's attention to the seriousness of the violations and to deter noncompliance with FIFRA and its regulations in the future. This is especially true in the case of a company like

Respondent, which operates a number of grain storage facilities and which deals with a large volume of grain, presumably necessitating periodic treatment with pesticides.

The record of the proceeding shows that the proposed penalty takes into account the factors required by the statute and is a just and reasonable penalty for the violations charged.

Section 14(a) of FIFRA, 7 U.S.C. §136 l(a), authorizes EPA to assess a penalty not exceeding $5,000 for each violation of the Act. That Section further provides that "[i]n 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." 7 U.S.C. §136 l(a). These factors form the basis of the penalty matrix for each violation, as set out in the FIFRA penalty policy, 39 Fed. Reg. 27711 (July 31, 1974). (Complainant's Exhibit 14). As Mr. Robert Harding testified, EPA adhered to that policy in proposing a penalty in this case. (Tr., p 40)

As to the size of Respondent's business, the record indicates by a Dun and Bradstreet report that Respondent's gross annual sales exceeded $1,000,000 (one million dollars) in 1984. (Complainant's Exhibit 10) This figure places Respondent in the highest category for business size in the penalty matrix. Respondent produced no evidence to show that it should not be placed in this category. The report on which Complainant relies, a computer print-out supplied by Dun and Bradstreet, is commonly relied upon by the Agency in penalty determinations.

As in other FIFRA cases, EPA assumes that the penalty proposed for the appropriate size of business category will not affect Respondent's ability to continue in business, absent documentation by Respondent showing an adverse effect. 39 Fed. Reg. 27711, 27712. (Complainant's Exhibit 14; second page)

The third requirement of Section 14(a) of FIFRA is that a civil penalty assessment take into account the gravity of the violation. It is important to note that in order to justify a penalty, EPA need not show that actual harm occurred. "The [Consolidated] Rules [of Practice] contemplate the potential for harm, since actual harm is infrequently encountered." In re World Wide Industrial Supply, Accelerated Decision, FIFRA 1985-01-13-012P (January 9, 1986), at 3. Because the product involved in the instant matter is a restricted use pesticide, the potential for harm is very great. The use of such a toxic chemical except in strict compliance with EPA regulations creates an unreasonable risk of harm. (Tr., p 50)

The first violation charged, indeed, involves misuse of the restricted use pesticide. Such misuse merits the highest penalty which can be assessed under FIFRA, for the appropriate size of business category, as indicated by the penalty matrix.

Complainant's expert witness, Dr. Wuerthele, testified at length about the hazards of exposure to phosphine gas, the active agent in phostoxin and in the other formulations of aluminum phosphide which Respondent uses or has used. The record shows that exposure may severely affect respiration, neurological function and may lead to death. (Complainant's Exhibit 13; Tr., pp

27-29) In fact, the concentration of phosphine gas in a grain elevator during a normal fumigation may supply a lethal dose. (Tr., p 30) Dr. Wuerthele further explained that there is no antidote for phosphine gas poisoning and that there is no certain way to determine when concentrations are low enough to re-enter a fumigated area without a measuring device. (Tr., p 34) Finally, the gas dissipates at different rates of time. (Tr., p 33) Dr. Wuerthele advised that an approved respirator will protect workers from concentrations of the gas which might be encountered during fumigation and that such equipment should probably be carried when re-entering the fumigated area. (Tr., pp 34-35)

Mr. Koch's testimony then demonstrated what could go wrong during a pesticide application at a grain elevator, making it necessary for a worker to use a gas mask. First, the grain elevator at Respondent's facility contains several kinds of machinery with moving parts, including an elevator for the workers. (Tr., pp 65-67) Although Mr. Koch indicated that this had not happened, the machinery could jam or break down during a fumigation, necessitating re-entry to make repairs. Then, too, Mr. Koch admitted, pellets of phostoxin are sometimes spilled. (Tr., pp 90-91) It is quite possible that pellets might end up in the applicator's clothing or lodged in a place other than the sealed bin which is being treated.

Finally, Mr. Koch related that he had on occasion returned to the headhouse, at the top of the grain elevator, to refill the pesticide dispenser during the process of fumigation. (Tr., p 93) It is possible that someone refilling the dispenser could be overcome by the gas, requiring

another worker to re-enter the elevator to rescue him. From Mr. Koch's testimony, one could conclude that there were no emergency procedures in place at the facility. (Tr., p 95)

It is important to note that before 1984, Respondent did not have a Draeger tube, the device which measures concentrations of phosphine gas, and its employees had to rely on the smell of the gas, or impurities in the gas, to determine when they could safely re-enter. (Tr., p 94) As Dr. Wuerthele indicated, that in itself was a very dangerous practice. (Tr., p 34)

In determining the proposed penalty for Respondent's failure to keep approved protective equipment available, Complainant used the penalty matrix for use or disposal of a pesticide in a manner inconsistent with its labeling, which is charge code E28 in the FIFRA penalty policy, Fed. Reg. 27711, 27719. (Complainant's Exhibit 14, ninth page) For this violation there are three levels of penalty, depending whether adverse effects are considered highly probable, unknown, or not probable.

In this instance, because the misuse involves a restricted use pesticide with all the indications of potential hazard discussed above, Complainant chose the "Adverse Effects Highly Probable" category and thus proposed a penalty of $5,000, which is appropriate for a violation of this gravity when the violator is in the largest size of business category. The fact that Respondent instituted corrective measures after the EPA inspection, as Mr. Koch's affidavit indicated, is not a factor which would be taken into account in determining the proposed penalty.

The second violation, failure to keep records of use of a restricted use pesticide, is a violation which the Agency does not treat lightly. First of all, FIFRA is primarily a notification and recordkeeping statute. Accelerated Decision, In the Matter of Harmack Grain Co., Inc., Docket No. IF&R VIII-150C (April 13, 1986), at 8. Only by means of notification and recordkeeping can EPA adequately monitor the use of products which have commercial value specifically because of their toxic effects on living organisms.

Maintaining records of use of such products is essential, so that the Agency can conduct follow-up inspections, can verify complaints by the public, and most important, can determine whether the applicator has used the pesticide according to label instructions and thus has not created an unreasonable risk of harm.

Since applicator recordkeeping does not yet have a separate matrix in the penalty policy, Complainant relied on guidance from EPA headquarters to determine the proposed penalty for this charge. (Complainant's Exhibit 15) That guidance directs Complainant to use the charge code for producer recordkeeping, which is identified as E39 in the policy. 39 Fed. Reg. 27711, at 2716. (Complainant's Exhibit 14, sixth page) For that violation, there is only one level for gravity of harm; in the column for largest business size, the penalty is $4,200. Again, the fact that Respondent may have instituted proper recordkeeping practices after the inspection is not a consideration.

ORDER[2/]

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a)(1), 7 U.S.C. §136 l(a)(1), a civil penalty of $9,200.00 is assessed against Bartlett and Company Grain for violations 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:

U. S. EPA, Region VIII
(Regional Hearing Clerk)
P. O. Box 360859M
Pittsburgh, PA 15251

It is so ordered.

Edward B. Finch
Administrative Law Judge

Dated: August 14, 1986
Washington, D. C.

2/ Unless an appeal is taken pursuant to the rules of practice, 40 CFR 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 CFR 22.27(c).

CERTIFICATION

I hereby certify that the original of this Initial Decision was hand-delivered to the Hearing Clerk, U. S. EPA, Headquarters, and that three copies were sent by certified mail, return receipt requested, to the Regional Hearing Clerk, U. S. EPA, Region VIII, for distribution in accordance with 40 CFR 22.27(a).

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: August 14, 1986