85 MAR 20 P12:47

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Coharie Mill & Supply Co., Inc., | ) | Docket No. IF&R-04-8545-C |
| | ) | |
| Respondent | ) | |

1. FIFRA-Stop Sale, Use, or Removal Order - Distributor holding 14 one gallon cans of an EDB pesticide and served with a Stop Sale, Use, or Removal Order was not justified in burying the 14 gallons in a field notwithstanding that the Order contained no reference to disposal of the product, the state inspector told the distributor to get rid of the product, and the cans were deteriorating. The terms of the order were sufficient to place upon the distributor the duty of inquiring from the EPA as to the proper method of disposing of the product.

2. FIFRA-Civil Penalty - Penalty of $5,000 requested for violation of a Stop Sale, Use, or Removal Order reduced to $1,000, where violation was based upon misunderstanding of the terms of the order, and was an isolated incident.

Appearance for Complainant: Charles E. Rooks, Esquire
Assistant Regional Counsel
U.S. Environmental Protection Agency
Region IV
345 Courtland Street, N.E.
Atlanta, GA 30312

Appearance for Respondent: Timothy W. Howard, Esquire
Post Office Box 81
Clinton, North Carolina 38328

## INITIAL DECISION

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, as amended ("FIFRA"), section 14(a)(1), 7 U.S.C. 136 l (a)(1), for assessment of a civil penalty for an alleged violation of the Act. 1/

A complaint was issued by the Director, Air, Pesticides and Toxics Management Division, Region IV, United States Environmental Protection Agency ("EPA") on June 4, 1985, charging Respondent, Coharie Mill and Supply Co., Inc., with disposing of 14 one gallon cans of a pesticide containing ethylene dibromide ("EDB"), in violation of a stop sale, use, or removal order issued by the EPA, pursuant to FIFRA, section 13, 7 U.S.C. 136(k). A penalty of $5,000 was requested. Respondent answered admitting that it had disposed of the pesticide but denying that it violated the order in doing so. A hearing was requested.

A hearing was held in Fayetteville, North Carolina on February 4, 1986. Following the hearing both parties submitted briefs on the legal and factual issues. On consideration of the entire record and the briefs of the parties, a penalty of $1,000 is assessed.

---

1/ FIFRA, section 14(a)(1) provides as follows:

> Any registrant, commercial applicator, wholesaler, dealer, retailer or other distributor who violates any provision of this Act may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense.

## Findings of Fact

1. Respondent Coharie Mill & Supply Co., Inc., is located in Clinton, North Carolina. Tr. 4. 2/

2. Respondent is engaged in the buying and selling of grain, the operation of a grain mill and the retail selling of agricultural supplies. Respondent's Exh. 1.

3. On March 23, 1984, Kenneth E. Warren, a pesticide inspector with the North Carolina Department of Agriculture, made a routine inspection of Respondent. Complainant's Exh. 4, Tr. 8.

4. At that time there was a cooperative enforcement agreement between the State of North Carolina and the EPA under which state inspectors conducted investigations for both the state and the EPA. Tr. 38.

5. Mr. Warren noticed during his inspection that Respondent had in a display area to the rear portion of the store 14 one-gallon containers of the pesticide "T-H Grain Conditioner and Weevil Killer", EPA Reg. No. 148-287, manufactured by Thompson-Hayward Chemical Company, Kansas City, Kansas. The containers had no price tag nor were they marked with a price. Tr. 10; Complainant's Exh. 4.

6. The label for "T-H Grain Conditioner and Weevil Killer", EPA Reg. No. 148-287, disclosed that the product contained 5% EDB.

7. On February 3, 1984, approximately two months prior to the inspection, the Administrator of the EPA had issued an order suspending the registration of EDB pesticide products registered for use as a grain fumigant and spot fumigant of grain milling machinery. 49 Fed. Reg. 4452 (February 6, 1984). On the same date, the Administrator issued

---

2/ Reference is to the transcript of the hearing.

a stop sale, use, or removal order with respect to such EDB pesticide products, which stated in pertinent part as follows:

STOP SALE, USE, OR REMOVAL ORDER

By the authority vested in me pursuant to section 13(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), as amended (7 U.S.C. § 136k(a), you are hereby ordered not to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, receive and (having so received) deliver or offer to deliver, remove, or use any pesticides under your control, ownership, or custody that were suspended by the Administrator's Emergency Suspension Order of February 3, 1984. In addition, you are hereby ordered not to use any pesticide product containing ethylene dibromide on grain or grain milling equipment.

* * *

This order pertains to all quantities of such pesticides within the ownership, control or custody of the above-named company, agency, or person, wherever located. The pesticides may not be sold, used, or removed other than in accordance with the provisions of this Order or of further Stop Sale, Use, or Removal Orders as may be issued in connection with the pesticides.

Any person violating the terms or provisions of this Order shall be subject to the civil or criminal penalties prescribed in section 14 of FIFRA (7 U.S.C. § 136 l).

Should you have any questions regarding this Order, contact the appropriate EPA regional official on the enclosed list. This list contains a breakdown of each State which is under the jurisdiction of each of the ten EPA regional officials. An initial listing of products affected by this Order is enclosed.

Complainant's Exh. 1.

8. Respondent received one of the stop sale, use, or removal orders. Tr. 5; Complainant's Exh. 13.

9. The product carried by Respondent was listed in the list attached to the order as "De-Pester Grain Conditioner and Weevil Killer." Uniroyal Chemical, Division of Uniroyal, Inc. was named as the registrant.

10. Mr. Warren on discovering the EDB product, spoke to the Respondent's manager, W. Nelson Waters, and testified as follows about the conversation:

A. [Mr. Warren] I told him that the containers that I observed were old; he did not have a price on them, but yet they were there in a display area, and I told him I didn't think that was a good idea to have them there.

Q. Is that because you thought that they were being offered for sale?

A. No, sir. It was because of the condition of the containers. There was some rust around the bottom edges. They were old products. And then too, a closer examination revealed the fact that they did have EDB in them, or listed EDB.

Tr. 10-11.

Mr. Warren went on to say that he suggested to the manager "to get rid of them [the 14 cans]." Tr. 11, 20.

11. Mr. Waters had his employees remove the cans from the shelf and place them in a metal shed behind Respondent's mill, which was the only place available for storage. Tr. 78.

12. A few weeks later Mr. Waters took the cans and buried them in a 200 acre field owned by Respondent. Complainant's Exh. 13. He testified that he did so because he could smell the cans, that there was rust on the cans, he knew from past experience that the chemical was corrosive, and he was concerned about exposing himself and his employees to the vapors. Tr. 83-84; Complainant's Exh. 13.

13. Respondent heard nothing further from the State or the EPA regarding the 14 gallons of pesticide until he received a copy of a letter sent by Department of Agriculture of the State of North Carolina to Thompson-Hayward Co. on October 9, 1984. The letter requested Thompson-Hayward to notify the State Department of Agriculture of the disposition of the product. Respondent replied to the letter advising that it had buried all 14 gallons on its farm. Complainant's Exhs. 5, 7. On December 20, 1984, Respondent's disposal of the 14 gallons was investigated by Robert G. Stryker, an investigator for the EPA. Complainant's Exh. 10.

## Discussion, Conclusions and Penalty

The question here is whether Respondent should have known from the terms of the stop sale, use, or removal order, that burying the 14 cans of EDB product was prohibited.

The order by its terms expressly applied to all EDB products registered for use as a grain fumigant or spot fumigant of grain milling machinery. The "T.H. Grain Conditioner and Weevil Killer" held by Respondent was just such a product. While the name in the list accompanying the order was different, the order stated that this was only an "initial listing." If Respondent had a question about whether the product held by it was banned, Respondent should have called the appropriate Regional Office. It would not have been reasonable for Respondent to have simply assumed that its product, although containing EDB, was not covered by the order, and Respondent's argument to the contrary is rejected.

This being said, however, does not dispose of the issues in this case. The claim is that Respondent should have known that disposing of the pesticide by burying it was also prohibited by the order. Such prohibition must be inferred from the fact that the order forbid the pesticide from being "sold, used or removed other than in accordance with the provisions of the Order or of further . . . Orders as may be issued in connection with the pesticides." The key word is "removed." The word is used ambiguously in that not all removal was in fact prohibited. The EPA, for example, does not question Respondent's removal of the product from the shelf. Indeed, such action was undoubtedly required to dispel any implication that the product was being offered for sale. What is questioned is Respondent's removal of the pesticide from the shed where Respondent stored it after taking it off the shelf. 3/ Respondent, however, was also concerned about the hazards of leaving the product in the shed, and this coupled with the fact that the State inspector had suggested that Respondent "get rid" of the product, could have understandably led Respondent to believe that burying the pesticide would not be prohibited by the order, particularily since the order contained no language specifically prohibiting disposal of the product. 4/ I find,

---

3/ See Tr. 57.

4/ Complainant argues that the State inspector had no authority to advise Respondent on disposal (brief at 5). Respondent, of course, could not have relied on any advice from the inspector that directly conflicted with the terms of the order. But here the advice to "get rid" of the pesticide did not expressly conflict with the terms of the order. It is unlikely that the inspector knew that Respondent would interpret what the inspector said as an authorization to go out and bury the product. Again we are presented with a possible deficiency in communication because the words are susceptible to more than one interpretation.

accordingly, that Respondent did not intentionally or knowingly violate the order.

Nevertheless, given the hazardous nature of the pesticide, Respondent cannot be said to have acted with that degree of care that would be expected under the circumstances. Admittedly, the order may have left Respondent in a quandry as to what it was to do with a product that could be harmful if Respondent continued to store it. Given the hazardous nature of the product, however, it is not unreasonable to expect a prudent person to have made further inquiry of the EPA before he proceeded to bury it with the possible adverse environmental consequences that this might entail. Nevertheless, it must also be recognized that this case could have been avoided if the order or letter accompanying it had specifically stated that the pesticide should be stored in a safe location pending further instructions as to its disposition, rather than leaving this to be inferred from the prohibition against removal. 5/

The FIFRA civil penalty guidelines provide that in determining the appropriate penalty, consideration may be given to the person's history of compliance, and evidence of good faith under the circumstances. There is no evidence here of any other violations by Respondent and the incident appears to be an isolated one which is not likely to be repeated. Taking these factors into account and also that a civil penalty is not intended

---

5/ It is to be noted that just such instructions were given in a letter sent to users of EDB. See 49 Fed. Reg. 49801 (December 21, 1984).

to be punitive but to deter violations, I find that an appropriate penalty under the circumstances of this case is $1,000. While payment of a penalty in this amount might be burdensome, I find that it, would not adversely affect Respondent's ability to continue in business. 6/

ORDER 7/

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 $1,000 is assessed against Respondent Coharie Mill & Supply Company, 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 order upon Respondent forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America and mailed to:

EPA - Region 4
(Regional Hearing Clerk)
P.O. Box 100142
Atlanta, GA 30384

Gerald Harwood
Administrative Law Judge

Dated: March 20, 1986
Washington, D.C.

---

6/ See Respondent's Exhs. 1 and 2.

7/ 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).