UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY 86 APR 29 P 2: 40

BEFORE THE ADMINISTRATOR

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| In the Matter of | ) | |
| | ) | |
| Custom Chemical & Agricultural Consulting and David H. Fulstone, II, | ) | Docket No. FIFRA-09-0387-C-84-20 |
| | ) | |
| Respondents | ) | |

Federal Insecticide, Fungicide and Rodenticide Act. Sale of restricted use pesticides to uncertified applicators is unlawful.

Federal Insecticide, Fungicide and Rodenticide Act. The proviso contained in Section 12(a)(2)(F) permitting the sale of restricted use pesticides to uncertified applicators is inoperative in the absence of regulations issued by the Administrator. (See Initial Decision of this Court in Tierra Verde Company, Inc., Docket No. IF&R IX-0422-C-85-1, December 2, 1985. Final Agency Decision, February 4, 1986.)

Appearances:

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Counsel for Respondents

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U. S. EPA, Region IX
215 Fremont St.
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Counsel for Complainant

INITIAL DECISION

of

Edward B. Finch
Chief Administrative Law Judge

This is a civil administrative Complaint issued on February 7, 1984 which instituted action pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (FIFRA) 7 U.S.C. 136 et seq. The Complaint is the United States Environmental Protection Agency (EPA) Region 9. The Respondent is Custom Chemical and Agricultural Consulting and David H. Fulstone II, a principal shareholder of Respondent.[1/]

The specific charge in the Complaint is that Respondents made a pesticide, Phostoxin, which is classified as a restricted use pesticide (RUP) available for use or to be used by an uncertified applicator, or by an uncertified applicator not acting under the direct supervision of a certified applicator, in violation of Section 12(a)(2)(f) of FIFRA (7 U.S.C. 136 j(a)(2)(F).

A summary of the specific instances enumerated in Counts 1-21 are listed below with date of sale and name of purchaser.

1. Buckskin Ranch -- 12/6/82; 1/14/83
2. Mike Stewart -- 12/10/82; 3/8/83
3. Lee Ivey -- 1/28/83

1/ The original Complaint did not include David H. Fulstone II as a Respondent. A Motion To Amend Complaint was granted to include David H. Fulstone II as a Respondent.

4. Thran-Cary Ranch -- 1/14/83
5. Terry Crosby -- 1/25/83; 2/3/83; 2/9/83; 3/8/83
6. 4 G Corporation -- 1/24/83
7. Riversplit Ranch -- 2/24/83
8. P. V. Ranch-Tom Foote -- 2/24/83
9. Fred Searles -- 3/8/83
10. A Lazy Ranch-Robert McIvor -- 3/11/83
11. DePaoli Brothers -- 3/24/83
12. Tribbols Ranch -- 3/29/83
13. Buster High -- 3/8/83
14. 3-2 Bar Ranch-Jim Andrae -- 12/3/82; 2/14/83; 2/23/83

To reiterate, the basic charge is that these parties were not certified at the time the Phostoxin was made available for use and there was no indication in Respondent's records of the transaction that the applicator who was expected to use the Phostoxin was certified in accordance with Section 4(a)(2) of FIFRA (7 U.S.C. 136b(a)(2)).

Complainant has proposed that a civil penalty of $21,850.00 be assessed against Respondent for these alleged violations.

A timely Answer was filed which:

1. Denies Respondent is a person under Section 2(s)(7 U.S.C. 136(s)).

2. Admits that at all times mentioned in the Complaint Respondent distributed into commerce the product Phostoxin, but denied that said product is presently being distributed.

As to the civil penalty, Respondent answered:

The Respondent for reasons herein stated denies that any civil penalty should be assessed. However, should it be determined that Respondent violated any sections of FIFRA, the civil penalties as set forth in Section II of the Complaint are excessive and confiscatory for the reasons (1) the size of Respondent's business at the time of the alleged violations does not warrant the amount of damages, (2) that Respondent has ceased to conduct business and has completely liquidated its inventory and has debts exceeding the amounts received as the result of the liquidation, (3) the gravity of the offense claimed in the Complaint do not warrant such penalties, (4) no harm resulted to health or environment from any of the claimed activities of Respondent, (5) Respondent was not given notice and opportunity for a hearing on the charges alleged in the Complaint in the County of the principal place of business of Respondent, and (6) Respondent has always conducted its sale of restricted use pesticides in the exercise of due care.

Affirmative defenses raised in Answer.

1. All sales of Phostoxin by Respondent have been made with the exercise of due care and have not caused any harm to health or the environment.

2. All sales of Phostoxin by Respondent have been made to a licensed applicator <u>or</u> to persons who are not certified applicators for application by certified applicators.

3. To the best knowledge and belief of the Respondent, all Phostoxin sold by it has been applied by certified applicators

or under the direct supervision of certified applicators as defined in Section 2(e)(4) of FIFRA.

4. Respondent has maintained and kept records of all sales of Phostoxin in accordance with all Federal and State laws and regulations.

5. All sales of Phostoxin by Respondent were in compliance with Federal and State laws and regulations.

6. Federal and State laws and regulations do not require a distributor of any registered pesticide classified for restricted use to indicate in its sale records who the certified applicator of the pesticide is to be.

7. Respondent has cooperated fully with all Federal and State employees in inspecting and obtaining copies of all sales information and records maintained by Respondent.

## Findings of Fact

1. That Custom Chemical & Agricultural Consulting is a Nevada corporation.

2. That Custom Chemical & Agricultural Consulting and David H. Fulstone II, respectively (hereinafter "Respondents"), are a person as defined in Section 2(s) of FIFRA [7 U.S.C. §136(s)].

3. That Respondent distributed into commerce the product, Phostoxin, at its place of business located at 12 South Main Street, Yerington, Nevada 89447.

4. Phostoxin is a pesticide as defined in Section 2(u) of FIFRA [7 U.S.C. §136(u)].

5. That the product, Phostoxin has been registered with the Administrator, U. S. Environmental Protection Agency and assigned EPA Registration Number 40285-1.

6. That Phostoxin, EPA Registration Number 40285-1, contains the sole active ingredient Aluminum Phosphide and is classified for restricted use in accordance with Section 3(d) of FIFRA [7 U.S.C. §136a(d)] and the Code of Federal Regulations Title 40, Section 162.31 because of inhalation hazards to human beings.

7. That Respondents made the product, Phostoxin, a restricted use pesticide, available for use or to be used by an uncertified applicator, or by an uncertified applicator not acting under the direct supervision of a certified applicator.

## Statement of Facts

The facts which led to the initiation of this investigation are important. A routine review of dealer records from Van Waters and Rogers, 2256 Junction Avenue, San Jose, California, indicated that Custom Chemicals and Agricultural Consulting had purchased Phostoxin on the following dates:

November 15, 1982 -- 14 Flasks of Phostoxin Tablets, EPA Registration No. 40285-1

February 1, 1983 -- 14 Flasks of Phostoxin Tablets, EPA Registration No. 5857-1

April 1, 1983 -- 14 Flasks of Phostoxin Tablets, EPA Registration No. 5897-1.

Corresponding reports submitted to the State of Nevada Department of Agriculture for Custom Chemical and Agricultural Consulting showed one sale of restricted use pesticides for the period from October 1982 to March 1983. That sale was for 30 gallons of paraquat to a customer identified as Peri Farms.

The noted inconsistency in records of sale and purchase of Phostoxin and a request from the District Attorney for Lyon County to audit the records of Custom Chemical and Agricultural Consulting prompted a books and records inspection by the Nevada Department of Agriculture to determine whether or not restricted use pesticides were made available for use by persons who were not certified at the time of the purchase. The inspection was conducted on April 8, 1983.

During the course of the inspection the owner of Custom Chemical and Agricultural Consulting, David H. Fulstone II, made statements which were perceived as an admission that he knew that Phostoxin tablets were restricted under the law as to use and that he was knowingly selling the tablets to individuals who were not certified. Tr., p. 53 Fulstone had filed the Registry For Purchase of Restricted-Use Pesticides with the Department of Agriculture showing no sales of restricted use pesticides. EPA-1 When questioned about this practice, he indicated that he did so to avoid the possibility of harassment of his customers by the inspectors from the Nevada Department of Agriculture.

An amended Registry for Purchase of Restricted-Use Pesticides for Custom Chemical and Agricultural Consulting dated April 11, 1983 filed with the Nevada Department of Agriculture showed twenty-four (24) additional sales of

restricted use pesticides. EPA-1-3 These sales were for the period from October 1982 to March 1983. Prior to amendment, the Registry on file showed only one sale for the same period. The 24 sales reported involved seventeen (17) individuals. Fourteen (14) of the 17 individuals identified in the amended report as purchasing restricted use pesticides were interviewed by the Department of Agriculture inspectors. Five of the 14 knew that the product was restricted and were certified. Two uncertified individuals knew the product was restricted. The remaining seven individuals did not know that the product was restricted to certified applicators.

## Discussion

### I. Complainant's Evidence.

The testimony of Complainant's witness, William R. Jeffress, clearly establishes the fact that there were sales of the restricted use pesticide Phostoxin by Respondents and that the purchasers who are listed in the Amended Complaint were uncertified at the time of the purchase. That the application of the pesticide Phostoxin was not in compliance with FIFRA and the implementing regulations or the laws of the State of Nevada.

The testimony of Lawrence E. Blalock clearly establishes the fact that the Respondent David H. Fulstone II, was not certified at the time of the sales listed in the Amended Complaint and Notice of Opportunity for Hearing and that the purchasers of the Phostoxin were either never certified or the certification had lapsed at the time of the application. Blalock's evidence further corroborates that given by Jeffress with respect to Respondent Fulstone's attitude with respect to the sales of Phostoxin to

uncertified applicators and the falsehood practiced by Respondent Fulstone in filing the Registry For Purchase of Restricted-Use Pesticides required under Nevada law.

The testimony of Harlan Specht establishes the fact that none of the persons to whom the restricted use pesticide was sold as enumerated in the Amended Complaint were pesticide dealers.

II. Respondents' Evidence.

Respondents' evidence does not controvert in any significant manner the evidence presented by Complainant.

Respondents called Buster High, one of the purchasers of Phostoxin. Mr. High testified that he was told that Phostoxin was restricted at the time of purchase and that it was to be applied either by or under the direct supervision of a certified applicator. Mr. High went on to describe the instruction given at the time of purchase. Mr. High had been certified and believed at the time he applied the Phostoxin that he was still so, even though his certification had expired.

Respondent, David H. Fulstone II, was the principal witness for Respondents. Mr. Fulstone sat at counsel table during the presentation of Complainant's case and heard all of the testimonial evidence.

Mr. Fulstone testified that he is the Vice Chairman of the Board, Nevada Department of Agriculture, and has been involved with the Board over some period of time. In addition, he is also President of the Nevada Farm Bureau and along with his father's ranching company, David H. Fulstone Company, the owner of the Respondent corporation.

With respect to the substantive issues presented by the pleadings, Mr. Fulstone's testimony set forth in detail various excuses for selling the Phostoxin to farmers who were not qualified to apply the pesticide and from whom Mr. Fulstone failed to ascertain the manner in which the pesticide would be applied at the time of sale. In response to the testimony of Mr. Jeffress regarding the reasons for the bogus registries filed with the Department of Agriculture, Mr. Fulstone stated that during the inspection by the Department of Agriculture that he did not want his neighbors harassed by the inspectors. Tr., p. 53

With respect to being available as the certified applicator under whose direction the various customers applied the Phostoxin, Mr. Fulstone testified that he was available by radio in the vehicles or by telephone. The Nevada Administrative Code, Certified Applicator Regulations set forth specific criteria for certified applicators. Mr. Fulstone, a State of Nevada Department of Agriculture official, appeared to be totally unaware of these standards.

Mr. Fulstone testified that in the case of every sale of the Phostoxin a supplemental label was provided. When asked on cross-examination if he determined that each purchaser would measure up to the standard set forth in the box at the top of the supplemental label which is a statement of Section 12(a)(2)(F) of FIFRA, Mr. Fulstone's response was, "I really didn't make a determination at that time."

Mr. Fulstone testified at length concerning the financial condition of the corporate Respondent as well as his own dire financial condition. No evidence was presented as to the financial condition of the other owner of

the corporate Respondent, the David H. Fulstone Company. Respondent Fulstone did testify that his father had paid off most of the debt of the corporate Respondent.

The evidence in the record here overwhelmingly indicates that all of the sales listed in Counts 1-20 of the Complaint were to uncertified applicators and the same is true as to whether or not the RUP was applied by a certified applicator.

III. Penalty.

Complainant's witness, Robert A. Boesch, testified as to the calculation of the proposed penalty set forth in the Amended Complaint and Notice of Opportunity for Hearing. Respondent Fulstone testified that the sales of the corporate Respondent for the years 1981, 1982 and 1983 were $100,000; $400,000; and $200,000; respectively. These sales figures raised a question by the presiding Chief Administrative Law Judge as to the calculation of the penalty. Category II under the penalty guidelines covers sales between $100,000 and $400,000. Mr. Boesch indicated in his testimony that Category II of the penalty guidelines was used in the calculation of the proposed penalty.

While Mr. Boesch's testimony resolves the question raised by the presiding Chief Administrative Law Judge as to the policy category to be applied, the more significant question is whether or not these Respondents are capable of paying a penalty if a penalty is assessed. The short answer is: Yes, the Respondents are not without funds. Testimony was presented that the two owners of the corporate Respondent are the Respondent Fulstone and the David H. Fulstone Company. No evidence was presented as to the financial condition of the David H.

Fulstone Company. There is evidence, however, that the David H. Fulstone Company has either paid or guaranteed the debt of the corporate Respondent. There is no reason to believe that this owner of the corporate Respondent would be in any way impaired by the payment of a civil penalty assessed against these Respondents.

Numerous financial statements of Mr. Fulstone were submitted into evidence, including tax returns for the years 1982, 1983 and 1984, all of which would indicate a possible inability of Respondents to pay a civil penalty of $21,850.00. However, there was also introduced Resp. 3 which is a statement of financial condition of David H. Fulstone II and Diane E. Fulstone as of August 27, 1985, which was prepared by Widmer & Guy, Certified Public Accountants. This compilation of financial condition loses a substantial portion of its credibility by the caveat in the second paragraph thereof which reads:

> "A compilation is limited to presenting in the form of financial statements information that is the representation of the individuals whose financial position is presented. We have not audited or reviewed the accompanying financial statement and, accordingly, do not express an opinion or any other form of assurance on it."

## Conclusion

Based upon the record in this proceeding, it is concluded that Respondents did make available for use by selling the RUP Phostoxin to uncertified applicators, and there is also no evidence in the record to enable the Court to conclude that any of the RUP sold was applied by certified applicators.

Therefore, it must be found that all elements of the Complaint have been proved and the full amount of the proposed penalty is hereby assessed against Respondent.

## 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 $21,850.00 is assessed against Custom Chemical and Agricultural Consulting and David H. Fulstone II, 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:

U. S. EPA, Region 9
Regional Hearing Clerk
P. O. Box 360863M
Pittsburgh, PA 15251

It is so ordered.

Edward B. Finch
Chief Administrative Law Judge

Dated: April 29, 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 IX, for distribution pursuant to 40 CFR 22.27(a).

Leanne B. Boisvert
Leanne B. Boisvert
Legal Staff Assistant

Dated: April 29, 1986