UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
High Plains Cooperative, Inc.,	)	Docket No. I. F. & R.-VIII-198C
	)	
Respondent	)	

Federal Insecticide, Fungicide and Rodenticide Act - Rules of Practice - Penalty Guidelines - Determination of Penalty

Where evidence established that certification of applicator, under whose supervision application of a restricted use pesticide had been made, had lapsed, but that applicator, formerly certified in two states, was unaware of lapse in second state at time of application in question, gravity of harm and gravity of misconduct were determined to be slight and a substantial downward adjustment was made in penalty sought by Complainant.

Appearance for Complainant: Karen A. Adams, Esq.
Office of Regional Counsel
U.S. EPA, Region VIII
Denver, Colorado

Appearance for Respondent: Brian Cook, Esq.
O'Brien, Huenergardt and Cook
Attorneys at Law
Kimball, Nebraska

ACCELERATED DECISION

This is a proceeding under § 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 136 l(a)). The proceeding was commenced on December 2, 1986, by the issuance of a complaint, alleging that on or about May 13, 1986, an employee of Respondent, one Dave Bomberger, applied the restricted use pesticide Tordon-22K at a farm in the vicinity of Burns, Wyoming and that the mentioned application was not made by or under the supervision of a certified applicator in violation of §§ 3(d)(1)(C) and 12(a)(2)(F) of the Act. For this alleged violation, it was proposed to assess Respondent a penalty of $5,000.

By letter, dated December 9, 1986, Respondent's General Manager requested a hearing.

Under date of March 27, 1987, counsel for the parties executed a stipulation of facts. Complainant has filed a motion for an accelerated decision, contending that it is entitled to judgment as a matter of law, and that the proposed penalty is in accordance with FIFRA penalty guidelines and is appropriate. Respondent, while arguing that the infraction shown here justifies only a nominal penalty, has joined in the motion insofar as it asks that the matter be decided without further hearing.

Based on the stipulation and the briefs of the parties, I make the following:

FINDINGS OF FACT

1. Respondent, High Plains Cooperative, Inc., conducts business in Wyoming and Nebraska, having offices in Kimball, Nebraska and Pine Bluffs, Wyoming, and is a person within the meaning of § 2(s) of the Act.

2. On or about June 10, 1986, Mr. Rod W. Glebe, an authorized EPA inspector, conducted a use investigation and records review of Respondent's facility in Pine Bluffs, Wyoming.

3. Records at the mentioned facility indicate that the pesticide Tordon-22K was applied at a farm in the vicinity of Burns, Wyoming on May 13, 1986, by Respondent's employee, Mr. Dave Bomberger.

4. Tordon-22K, EPA Reg. No. 464-323, is, and, since 1982, has been a restricted use pesticide.

5. The application of Tordon-22K by Mr. Bomberger, referred to in finding 3, was accomplished under the direct supervision of Mr. Alan L. Curtis, another employee of Respondent.

6. On May 13, 1986, Mr. Curtis was certified (Applicator No. NF 277855, valid through March 1988) to apply restricted use pesticides, including Tordon-22K, in Nebraska. Mr. Curtis' Wyoming certification had, however, lapsed in January 1986.

7. At the time of the pesticide application in question, Mr. Curtis was unaware that his Wyoming certification had expired. Upon being informed of that fact, he immediately drove to Cheyenne and, on June 10, 1986, was issued Wyoming Commercial Pesticide Applicator License No. 0326, expiring January 31, 1989.

8. Respondent's gross sales are in excess of one million dollars. Chemical sales are a fraction of total sales and imposition of the penalty sought by Complainant would eliminate any profit on chemical sales in Wyoming.

CONCLUSIONS

1. Application of the restricted use pesticide Tordon-22K on May 13, 1986, as found herein was not made by or under the supervision of a certified applicator in violation of §§ 3(d)(1)(C) and 12(a)(2)(F) of the Act.
2. Under the circumstances shown here, the gravity of the violation and the gravity of the harm are slight and an appropriate penalty is the sum of $500.

DISCUSSION

Section 2(e)(1) of the Act (7 U.S.C. 136b.) defines certified applicator as an individual certified under § 4 as authorized to use or supervise the use of any pesticide which is classified for restricted use. Section 4(b), concerning state plans for the approval of certified applicators, provides that, if the Administrator approves a plan submitted under this paragraph, then such state shall certify applicators of pesticides with respect to such state. It is therefore concluded that an applicator, certified to apply or supervise the application of restricted use pesticides (RUPs), in one state, is not thereby authorized to apply or supervise the application of RUPs in another state. Section 3(d)(1)(C)

provides in effect that RUPs must be applied by or under the supervision of a certified applicator and § 12(a)(2)(F) essentially provides that it is unlawful to make available for use or to use any RUP other than in accordance with § 3(d). Therefore, it must be concluded that the application in Wyoming of the RUP Tordon-22K on May 13, 1986, under the supervision of Mr. Curtis, who was certified in Nebraska, but whose Wyoming certification had lapsed, was a violation of the Act.

The penalty proposed by Complainant, $5,000 was determined in accordance with the FIFRA Penalty Guidelines (39 FR 27711, July 31, 1974) and guidance issued by EPA's Office of Enforcement (memorandum, dated June 11, 1981). The memorandum indicates that using, or making available for use, RUPs, other than in accordance with § 3(d), should be analogized to use of a pesticide inconsistent with its labeling in the Penalty Guidelines and, inasmuch as RUP violations necessarily involve pesticides which may cause unreasonable adverse effects on the environment, placed in the highest category for penalty calculation purposes, i.e., adverse effects highly probable. Under this view, to determine an appropriate penalty, it is only necessary to ascertain the sales category into which the alleged offender should be placed. Respondent's gross sales being in excess of one million dollars, it was in sales category V of the guideline, resulting in a proposed penalty of $5,000.1/

Section 14(a)(4) of the Act requires the Administrator, in determining the amount of a penalty, to consider, inter alia, the gravity of the violation. Gravity of the violation is generally considered from two aspects:

1/ Respondent's argument that sales, for the purpose of applying the Penalty Guideline, should be measured only by pesticide sales, finds no support in the guideline and is rejected.

gravity of the harm and gravity of misconduct. Here, the stipulated facts are that the RUP was applied under the supervision of Mr. Alan Curtis, an individual certified and fully qualified to apply or supervise the application of RUPs in the State of Nebraska. Mr. Curtis also possessed all the qualifications for being a certified commercial applicator in Wyoming and this matter arises only because his license or certification was not in effect at the time of the application in question. Under these circumstances, the potential for adverse effects, which the guideline characterizes as highly probable, is, instead, considered to be slight. Because the stipulated facts are that Mr. Curtis was unaware at the time that his certification had lapsed, the gravity of the misconduct is also slight. Accordingly, it is my conclusion that $500[2/] is an appropriate penalty for the violation shown.[3/]

2/ In Helena Chemical Company, FIFRA-09-0439-C-86-18 (Initial Decision, June 9, 1987), counts, involving sales of RUPs under quite similar circumstances, were dismissed. While distinguishable, upon the ground there was evidence the applicator was orally informed certification in the second state was unnecessary, Helena Chemical is supportive of the view that the gravity of harm from violations under circumstances similar to those shown here is slight. It should be noted that in Harmack Grain Co., Inc., I.F. & R. Docket No. VIII-150C (Initial Decision, May 2, 1986), cited by Complainant, the penalty sought was reduced by 50 percent.

3/ Attached to Respondent's brief is an affidavit of Mr. Stan Hillius, Respondent's General Manager, which refers to statements by former counsel for Complainant concerning a reduction in the penalty. Complainant, citing Rule 22.22 (40 CFR Part 22) and Federal Evidence Rule 408, has moved to strike the affidavit and related portions of Respondent's brief upon the ground counsel's statements were made during the course of settlement discussions. Respondent has not replied to the motion and the motion being clearly meritorious, the motion is granted and the affidavit, and portions of the brief relying thereon, are stricken from the record and have not been considered.

ORDER

Respondent, High Plains Cooperative, Inc., having violated §§ 3(d)(1)(C) and 12(a)(2)(F) of FIFRA as charged in the complaint, a penalty of $500 is assessed against Respondent in accordance with § 14(a) of the Act. Payment of the penalty shall be made by submitting a cashier's or certified check, payable to the Treasurer of the United States, to the following address within 60 days of receipt of this order:4/

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

Dated this 29th day of June 1987.

Spencer T. Nissen
Administrative Law Judge

4/ In accordance with Rule 22.20(b) (40 CFR Part 22), this decision constitutes an initial decision which, unless appealed pursuant to Rule 22.30, or unless the Administrator elects, sua sponte, to review the same as therein provided, will become the final order of the Administrator in accordance with Rule 22.27(c).