UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
THE ADMINISTRATOR

In the Matter of: ORKIN EXTERMINATING CO., INC. (Roanoke, Virginia Facility) Respondent	I.F. & R. Docket No. III-301-C

1. FIFRA: Violation for use in a manner inconsistent with label directions found.

2. FIFRA: Based Upon annual sales and the fact that adverse effects were highly probable, the penalty proposed in the Complaint is accepted.

APPEARANCES:

Counsel for Complainant: Henry H. Sprague, Esq.
Robert J. Smoloski, Esq.
U.S. Environmental Protection Agency - Region III
841 Chestnut Street
Philadelphia, PA 19107

Counsel for Respondent: William F. Bartee, Jr., Esq.
Rollins Inc.
2170 Piedmont Road
Atlanta, GA 30324

Sam E. Isaacs, II, Esq.
Lexington, KY

INITIAL DECISION

By Complaint and Notice of Opportunity for Hearing filed January 22, 1987, the U.S. Environmental Protection Agency (hereinafter "Complainant", "EPA" or "the Agency") charged Orkin Exterminating Co., Inc. (hereinafter "Orkin" or "the Respondent") with violation of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA" or "the Act") 7 U.S.C. §136j, alleging that Orkin on July 12, 1985, applied the pesticide Orkil in a manner inconsistent with its labeling and proposed a penalty of $5,000.00 for such violation.

The Respondent filed its Answer on January 30, 1987, denying every allegation in the Complaint, contesting the size of the penalty and requesting a hearing.

The hearing was held on July 14 - 15, 1987, at the Federal Court House in Roanoke, Virginia and was continued until October 28, 1987, when the hearing was concluded at the EPA, Region IV offices in Atlanta, Georgia. Following the availability of the transcript, the parties filed their respective Proposed Findings and Briefs in support thereof.

FACTUAL BACKGROUND

On July 12, 1985, a representative of the Respondent visited the home of Walter and Patricia Sexton in Woodlawn, Virginia for the purpose of treating the house with the pesticide Orkil. The Sexton house is constructed on top of a concrete slab, which, in turn, rests directly on the ground. The Sexton house had been treated by Orkin at least two times prior to the July 12, 1985, treatment, once in 1981 and again in 1983. This application was in response to Mr. Sexton's

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identification of some termite infestation in one small area of the house. Mr. Sexton indicated to the employee that the door frame between the kitchen and bedroom was infested with termites and that re-treatment was necessary to take care of the trouble spot.

It was Mr. Sexton's uncontroverted testimony that the application was made in the following manner. The employee, Mr. Richardson, arrived at Mr. Sexton's home at approximately 8:00 on the evening of July 12, 1985, and Mr. Sexton smelled alcohol on Mr. Richardson's breath. Mr. Richardson after being advised of the location of the infestation went into the small bedroom adjacent to the door frame on the opposite side of the wall to the kitchen area and drilled one hole approximately 3/8" in diameter through the concrete slab and into the dirt beneath the slab. He then parked his truck in the front yard of Mr. Sexton, unreeled the hose and inserted a nozzle into the hole he had previously drilled in the floor. After standing there holding the nozzle lever for some period of time, he apparently became tired of this and wedged the nozzle open and went outside with Mr. Sexton to sit on the front steps and have a few cigarettes. Mr. Sexton, who does not smoke, became bored with this activity and went onto the house and observed that there was some of the pesticide oozing up around the nozzle which had been placed in the hole in the slab. He immediately ran outside and advised Mr. Richardson of this fact and Mr. Richardson turned off the pump at his truck and came back in to investigate the matter. When Mr. Richardson pulled the nozzle out of the hole in the floor a certain amount of pesticide oozed out and Mr. Richardson wiped the liquid up with a small rag which he had in his possession. Mr. Sexton testified that the tank which was on Mr. Richardson's truck holds

100 gallons of pesticide and that when he was finished with his application there remained only about 10 or 11 gallons of pesticide in the container and it was therefore his testimony that Mr. Richardson had injected approximately 89 gallons of the deluted pesticide Orkil through the slab and under his house. Mr. Richardson was on the premises for approximately one hour.

After Mr. Richardson left Mr. Sexton went into his kitchen and noticed a large wet spot on the kitchen floor approximately 8 x 3 feet in area which was soaking wet and smelled of the pesticide which Mr. Richardson had applied. Mr. Sexton got several towels which he folded and got on his hands and knees and attempted to blot up the material which was saturating the carpet in his kitchen. He went outside on several occasions and wrung out the towels and came back in and continued this operation until he had dried up the wet material to the best of his ability.

He then went to bed without bathing and the next morning he awoke with symptoms of nauesa, dizziness and headache. Mr. Sexton's wife, who is a Registered Nurse, contacted the family doctor who advised Mr. Sexton to come in and see him and in the meantime to vacate the premises until such time as the cause of Mr. Sexton's malady could be ascertained.

Mr. Sexton, shortly thereafter, vacated the premises along with his family and never returned to the house again until it was finally sold some years later at a considerable loss to him.

At the original hearing the Court tried to obtain the presence of Mr. Richardson, the applicator, to hear his version of the facts concerning the application of the pesticide, but EPA counsel bargained

away his appearance in return for stipulation by the Respondent of the authenticity of several training manuals and related materials which he intended to introduce into the record. At the reconvened hearing, the Court once again requested the presence of Mr. Richardson. This time he appeared with private counsel and stated that, in as much as the Agency had commenced criminal proceedings against the Company he would refuse to answer any questions on the basis of the 5th Amendment against self-incrimination and therefore refused to provide any information concerning his version of the facts surrounding the application of the above mentioned pesticide. Under the circumstances of the case I must accept Mr. Sexton's version of the facts surrounding the application of the pesticide and will base my decision upon the acceptance of such facts.

DISCUSSION AND CONCLUSION

The Orkil label contains several requirements as follows:

> "It is necessary to the safe and effective use of this product that the service technician be familiar with the current control practices including the overall treatment, trenching, rotting and sub-slab injection and wood impregnation procedures.
>
> "These techniques must be correctly employed to present or control infestation by sub-terrainian termites . . . chose of appropriate procedure should include consideration of such variable factors as the design of the structure, correction of faulty construction, soil moisture (including water table and rain fall), correction of moisture sources within the structure, soil type, soil compaction, grade conditions and type and proximity of domestic water supplies. Other important information should be known concerning the biology and behavior of the termite species involved as well as the suspected location of the colony and severity of infestation within the structure to be protected."

The Orkil label also includes specific rates of application of the pesticide under the heading "Directions for Use". Those portions relevant to the hearing state:

> "The chemical should be adequately dispersed in the soil to provide a barrier beween the wood the structure and the termite colonies in the soil or to eliminate termites living in the structure.
> 1. Where it is desired to produce a horizonal barrier (e.g. beneath a slab floor) apply at the rate of 1 to 1 1/2 gallons per 10 square feet, depending on conditions mentioned under "General Information" on the use of this product . . .." (Emphasis supplied).

The Respondent attempted to explain away the large volume applied in this case by suggesting that there was a void underneath the slab upon which Mr. Sexton's house rested and therefore it was necessary to fill up this void with pesticide in order to reach the termites which traditionally would build a termite tunnel across the bottom of the slab in order to reach a crack wherein they could reach the wood of the house. This argument of course is merely supposition in as much as no one knows what the conditions were underneath the slab. In any event, the amount of pesticide applied by Mr. Richardson was obviously in excess of that needed for the treatment of the infestation discovered since it found its way through a crack or expansion joint in the concrete slab and forced its way up into the kitchen of the house in quantities sufficient to saturate an area of 24 square feet.

I am therefore of the opinion that under the circumstances in this case, Mr. Richardson's application of the pesticide involved was made in a manner inconsistent with the label instructions in as much as he 1) simply drilled 1 hole and wedged the nozzle device in an open position and allowed the machine to pump the pesticide under the slab when he was

not there in attendance to see as to whether or not any excess was coming out of the hole. This activity, in my judgment, is in gross violation of the "Directions for Use" on the label and resulted in the application of a considerable amount of pesticide in excess of that needed to treat the termite infestation. Therefore the Respondent must be found in violation as set forth in the Complaint.

In addition to injecting a greater amount of pesticide than necessary, one of the expert witnesses appearing on behalf of the Complainant testified that there should have been more than one hole drilled and the 1 or 1 1/2 gallons of pesticide equally divided between the two holes. Although the label instructions do not require that more than one hole be drilled, in this instance it would appear that such an activity would have certainly been prudent. However, I do not base my decision on the failure of the Respondent's agent, Mr. Richardson, to drill more than one hole, but rather the manner in which he applied the pesticide, that is leaving the nozzle on and allowing approximately 89 gallons of the pesticide to be injected under the slab forcing its way up through the crack or expansion joint into the living area of the house, thus subjecting the Sexton family and Mr. Sexton in particular to exposure of this toxic chemical.

One of the Respondent's witnesses testified that in his judgment it is impossible to wedge the control valve open on the design which was used in this application. Mr experience indicates however that a workman, in most instances, is able to adapt the tools of his trade in such a manner to allow it to be used in the way in which he wishes it to be used even though this usage may contravene the manufacture's design features.

As noted above the Agency proposed a penalty of $5,000.00 in this case. We must now evaluate the record to determine whether or not this proposed penalty is appropriate given the facts and circumstances of this case. The proposed penalty was arrived at by application of the FIFRA Penalty Policy promulgated by the Agency. In determining the appropriate penalty to be assessed one must determine the annual sales of the Respondent involved. In this case, it was stipulated that Orkin has sales in excess of 1 millon annually, therefore placing it in Category 5 in the penalty matrix associated with the above mentioned penalty policy. Reference to the penalty policy suggests that "in use of a pesticide in manner inconsistent with its labeling" for those Respondents in the No. 5 Category the penalty should range from $1,200.00 to $5,000.00 depending upon the likelihood of adverse effects being present. In a situation where adverse effects are "highly probable" the penalty policy suggests a penalty of $5,000.00 which is what the Agency proposed in this case.

The Orkil label, which was the pesticide used in this case, states in part that "Hazards to humans and domestic animals. May be fatal if swallowed. Do no breath vapor, dust, or spray mist. Do not get in eyes, on skin or clothing . . . This product is toxic to fish, birds and other wild life." Additional warnings provide instructions if the person comes in physical contact with the pesticide. Such warnings described the potential physical harm if a person contacts Orkil. The two active ingredients of Orkil are chlordane and heptachlor which according to the label and the testimony of Complainant's witness, Dr. Molholt, are acutely toxic chemicals and even Respondent's witnesses agreed that chlordane is a toxic chemical. Therefore Orkil poses an extreme hazard inherent in its chemical makeup.

Given the potential hazard posed by Orkil and the fact that Mr. Sexton actually experienced some of the hazardous effects of the chemical upon his contact with it, I am of the opinion that the "highly probable" category is proper.

Under the circumstances in this case, I find that the Agency's determination of the penalty in the amount of $5,000.00 is proper and consistant with the penalty policy promulgated by the Agency.

ORDER[1]

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, Section 14(a)(1), 7 U.S.C. §136(a)(1), a civil penalty of $5,000.00 is hereby assessed against Respondent Orkin Exterminating Co., Inc. for violation of the Act found herein.

Payment of the civil penalty shall be made by submitting a cashier's or certified check payable to the Treasurer, United States of America and mailed to:

EPA - Regional Hearing Clerk
P.O. Box 360515 M
Pittsburg, PA 15251

Dated: January 15, 1988

Thomas B. Yost
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).

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing was served on the Regional Hearing Clerk, Region III (service by first class U.S. mail); and that true and correct copies were served on counsel for Complainant and on the Respondent (service by certified mail return receipt requested).

Dated in Atlanta, Georgia this ~~14th~~ 15th day of January 1988.

Marsha P. Dryden
Secretary to Hon. Thomas B. Yost

HONORABLE THOMAS B. YOST
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404/347-2681, Comm. 257-2681, FTS