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

6 DEC 1978

OFFICE OF ENFORCEMENT

MEMORANDUM

SUBJECT: Transmittal of Initial Decision in the Matter of Magna Corporation, et al, Respondents

TO: Douglas D. Campt, Acting Director
Registration Division

We are enclosing a copy of a letter from Lance C. Vinson dated November 22, 1978, as well as a copy of the Initial Decision In The Matter of Magna Corporation, et al., for inclusion in the file of information to be considered during the reregistration process for MAGNACIDE "H".

The Pesticides and Toxic Substances Enforcement Division concurs with Mr. Vinson's statement that the killing of 2,000 fish by this product should adversely affect the registration of the product.

In the case at hand, MAGNACIDE "H", a highly toxic herbicide, was used to treat irrigation canal water which was then allowed to flow into a fishbearing creek without being held for six days as the label requires. This caused the death of over 2,000 German Brown Trout in the creek. The Pesticide Misuse Review Committee has reviewed four other cases of misuse of this product, each incident resulting in large fish kills. One case is still pending criminal prosecution in Region X, and involves 238,000 fish which were killed, including 42,000 salmonoid fish.

On April 20, 1978, this Division sent the Registration Division a request to consider cancellation of this product.

A. E. Conroy II, Director
Pesticides and Toxic Substances
Enforcement Division

Attachments

RECEIVED
DEC 08 1978
Office of the Director
Registration Division (TS-767)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VIII
1860 LINCOLN STREET
DENVER, COLORADO 80295

NOV 22 1978

RT Prepare memo for my sig to Doug Craft
AT 11/17

Ref: 8E-EL

MEMORANDUM

TO: A. E. Conroy II, Director
Pesticides and Toxic Substances Enforcement
Division (EN-342)

SUBJECT: Transmittal of Initial Decision

Attached please find a copy of the Initial Decision that was rendered recently in, In The Matter Of Magna Corporation, et al. This was a prosecution for the misuse of MAGNACIDE "H", a highly toxic herbicide. Irrigation canal water treated with MAGNACIDE "H" was allowed to flow into a fishbearing creek without being held for six days as the label requires. This directly caused the death of over 2,000 prized German Brown Trout in the creek, in an area that was regarded as an outstanding fishery.

The company defended vigorously. They refused a prehearing settlement offer because they would not admit to liability for having caused the death of the fish. The trial lasted three days during which time the company introduced in excess of 150 exhibits as compared to 10 exhibits which we introduced. The company virtually conceded that they had violated two label directions; however, they strongly fought the allegation that their misuse was responsible for the death of the fish, which was a fact in aggravation of the violation.

The testimony of their chemist was interesting. He testified that the major thrust of his research activities, as well as of the four other chemists that he supervises, is to "prepare data suitable for submission to the Environmental Protection Agency which would allow us to reregister the product when the time arose". That testimony, I think, explains the company's defense. They were concerned that a finding their product had killed 2,000 fish would adversely affect the product's registration. I think it should. MAGNACIDE "H" is a highly toxic pesticide whose active ingredient Acrolein is one of the chemicals contained in the list prepared pursuant to the Consent Decree in NRDC v. Train, filed under Section 307 of the Clean Water Act.

2

I would suggest that a copy of this Opinion should be forwarded to the appropriate division in the Office of Pesticide Programs for their consideration.

Lance C. Vinson
Director
Enforcement Division

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

RECEIVED NOV 17 1978 ENVIRONMENTAL PROTECTION AGENCY HEARING CLERK

In the Matter of	)	
	)	
Magna Corporation, et al.,	)	I.F. & R. Docket No. VIII-35C
	)	
Respondents.	)	

INITIAL DECISION

This is a proceeding under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") Section 14(a)(1), 7 U.S.C. 136 l(a)(1) (1976), for the assessment of civil penalties for violations of the Act.[1/]

The proceeding was instituted by a complaint which charged that Magna Corporation ("Magna") and Michael Lofland, an employee of Magna, violated FIFRA, Section 12(a)(2)(G), 7 U.S.C. 136j (a)(2)(G) by misusing the registered pesticide MAGNACIDE "H". A civil penalty of $10,000 was asked against Magna, and a penalty of $5,000 against Lofland. Respondents' answered and denied the violation. They also contested the appropriateness of the proposed penalties. A hearing was requested.

A prehearing exchange of documents, witness lists and other information was accomplished through correspondence as permitted by the Rules of Practice, 40 C.F.R. 168.36(e), and these prehearing responses are made a part of the record. A hearing was held in Denver, Colorado,

---

1/The 1976 Edition of the United States Code contains FIFRA as it read prior to its recent amendment by the Federal Pesticide Act of 1978, Pub. L. 95-396, 92 Stat 819 (1978) (hereafter "1978 Pesticide Act"). These amendments have not affected the liabilities of the parties in this proceeding. All references to FIFRA, accordingly, will be to the 1976 United States Code, except when it is considered relevant to also discuss the amendment by the 1978 Pesticide Act.

4

by agreement of the parties on June 27, 28 and 29, 1978. Following the hearing, the parties filed proposed findings of fact, and conclusions of law and briefs on the legal issues. These submissions have been considered, and all proposed findings not adopted are rejected. It is concluded that a civil penalty of $7,800 should be assessed against Magna and that the complaint should be dismissed as to Lofland, since no penalty may be assessed against him.

Findings of Fact

1. Respondent Magna Corporation is a corporation organized under the laws of the State of California.

2. Respondent Michael D. Lofland is and has been an employee of Magna since June 1, 1975. On August 26, 1976, he was employed as a technical sales representative of Magna.

3. Magna distributes and sells a product called MAGNACIDE H, which is a pesticide registered with the United States Environmental Protection Agency ("EPA") pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, Section 3, 7 U.S.C. Sec. 136a and which bears EPA Registration No. 10707-9.

4. MAGNACIDE "H" is a water soluble material used for the control of submerged and floating weeds and algae in irrigation canals.

5. Acrolein constitutes about 92% of the content of MAGNACIDE "H" and is the active ingredient therein.

6. Acrolein is toxic to fish and MAGNACIDE "H" will kill fish at the application rates recommended by Magna for control of weeds and algae.

7. The label approved by EPA for MAGNACIDE "H" contains the following statements:

> "Do not release treated water for six days after application into any fish bearing water or where it will drain into them.
>
> ....
>
> Consult your State Fish and Game Agency before applying this product."

8. The State Fish and Game Agency for the State of Colorado is the Department of Natural Resources.

9. The St. Vrain Supply Canal, also known as the Carter Canal, is located in the State of Colorado, and distributes water from Carter Lake Reservoir to water users along the canal and on the St. Vrain Creek (also referred to as the St. Vrain River). The canal flows in a generally southerly direction from Carter Lake a distance of approximately 9.8 miles where it discharges into the St. Vrain Creek.

10. The St. Vrain Creek is a known fish bearing water.

11. On August 26, 1976, Lofland, applied approximately 74 gallons of MAGNACIDE "H" to the upper portion of the Carter Canal. The application was done for the purpose of controlling a severe aquatic weed growth in the first mile-long section of the Canal. MAGNACIDE "H" was applied from approximately 9:15 a.m. to 1:15 p.m. The canal at that time was following its normal course of flow into the St. Vrain Creek. It took about one hour and 30 minutes from the point where the MAGNACIDE "H" was applied for the treated water to reach the St. Vrain Creek, so that treated water flowed into the St. Vrain Creek during the period from about 10:45 a.m. to 2:45 p.m.

12. Lofland as part of the application attempted to neutralize the acrolein in the canal water before the water discharged into the St. Vrain Creek, by applying sodium bisulfite to the canal water at a point on the canal slightly upstream from where the canal discharges into St. Vrain Creek.

7

13. The application of the sodium bisulfite did not succeed in reducing the concentration of acrolein to a level where it would be non-toxic to fish in the St. Vrain Creek.

14. In the late afternoon on August 26, 1976, a number of dead and dying fish were observed in the St. Vrain Creek downstream from the confluence with the Carter Canal. The Department of Natural Resources was notified and an inspection by Wildlife Conservation Officer Gary Lee Brown of the Division of Wildlife, Department of Natural Resources, was made on the evening of August 26, of the creek about one-half mile downstream from the discharge point of the canal. Several fish were discovered to be dead or acting in a distressed manner. On the morning of August 28, 1978, Wildlife Conservation Officers Michael A. Babler and Robert Leasure surveyed the area and found about 1400 dead German Brown trout, 453 dead suckers, and other dead species of fish in a section of the St. Vrain Creek located between the confluence of the Carter Canal and the St. Vrain Creek and a point roughly 2 miles downstream. Only one dead German Brown Trout was found upstream from the discharge point of the canal.

15. Respondents in the course of applying MAGNACIDE "H" to the Carter Canal on August 26, 1978, released water treated with the product into the St. Vrain Creek, a fish bearing water, less than six days after application, in violation of the label's directions, and were responsible for causing the deaths of over two thousand fish in the St. Vrain Creek.

16. Respondents did not consult with the State Fish and Game Agency, the Colorado Department of Natural Resources, as required by the product's labeling before applying MAGNACIDE "H" to the Carter Canal on August 26, 1978.

8

Discussion, Conclusion, and Penalty

The Violations

Respondent, Magna, distributes MAGNACIDE "H", a herbicide. Magna's normal practice is to sell MAGNACIDE "H" to applicators licensed by Magna who apply the product after they have been instructed by Magna personnel in the techniques of application. Transcript of hearing ("Tr."), 249; Resp. Ex. 19 (label). Respondent Lofland is an employee of Magna, who, on August 26, 1976, was employed as a technical sales representative. Tr. 246. Sometime prior to August 26, 1976, Lofland was approached by the Northern Colorado Water Conservancy District with respect to using MAGNACIDE "H" in the upper part of the Carter Canal in order to kill a heavy infestation of aquatic weeds in that section. Tr. 247. The application was done on August 26, 1976, with Lofland in this instance doing the application himself with assistance from persons from the Water Conservancy District. Tr. 248-57, 320, 325. Enough MAGNACIDE "H" was added to the water at the application site to make a concentration of 1.95 parts per million ("ppm"), a quantity which would be fatal to fish.[2/] The Carter Canal flows into the St. Vrain Creek, a known fish bearing water, at a point about 9.8 miles from the application site. On the same day, August 26, and later in the day, the unusual occurrence of a large number of dead and dying fish was observed in the St. Vrain Creek, in the vicinity of where the Carter Canal discharged into the Creek.[3/] Virtually all the

---

2/ The label for MAGNACIDE "H" states that fish will be killed at the application rates recommended. Resp. Ex. 19. The application of 1.95 ppm was at the rate recommended for the weed growth in the canal. Tr. 259-62. The evidence indicates that the threshold of toxicity of acrolein, the active ingredient in MAGNACIDE "H", is well below 1.95 ppm. One study concluded that for fish exposed 4 to 8 hours to acrolein, a concentration above 0.2 ppm would be hazardous. Resp. Ex. 22 at 5. MAGNACIDE "H" is 92% acrolein.

3/ Wildlife Conservation Officer Roberts, who has patrolled the St. Vrain Creek for the past thirteen years, testified that he knew of no other fish kills in this area during this period. Tr. 146-47.

dead fish were found in a two mile section of the Creek immediately downstream from the discharge point of the Carter Canal. Tr. 36-38.[4/]

The above facts, which are not subject to material dispute, when coupled with the fact that tests on dead fish taken from the fish kill gave a positive response indicating the presence of large amounts of acrolein in the bloodstream of the dead fish (EPA Ex. 8), would seem to incontrovertibly establish that exposure to MAGNACIDE "H" caused the fish kill. Respondents, however, introduced evidence casting doubt upon the reliability of the gas chromatographic analysis of the dead fish performed by Mr. Wapensky, EPA's expert witness. The evidence suggests that the test may not be sufficiently specific to disclose whether the fish had actually been exposed to acrolein in toxic quantities. See Tr. 487-491, 598-99.[5/]

It becomes necessary, therefore, to examine respondent's contention that by the time the canal water discharged into St. Vrain Creek, the acrolein in the canal water had been reduced to non-toxic levels as a result of aeration in the canal, absorption of the aquatic weeds and by the application of sodium bisulfite to the treated canal water prior to its discharge into the creek.[6/]

4/ One dead German Brown Trout was found upstream from the Canal discharge point. Tr. 34.

5/ Experiments conducted by Dr. Kissel, respondent's expert, suggested that unknown products occurring in nature could give the same response in gas chromatographic analysis as acrolein. Tr. 496, 598.

6/ Acrolein apparently combines with sodium bisulfite to form a non-toxic stable substance. Tr. 535-36. If all acrolein were either removed from the water or converted into a non-toxic product before the canal water discharged into the St. Vrain Creek, any violation resulting from releasing the treated water into the Creek in less than six days would be de minimus.

The possibility that turbulence in the water along portions of the canal flow and the absorption by weeds in the canal had any significant effect on reducing the concentration of acrolein can quickly be dismissed as too speculative to be given any credence. Mr. Lofland's testimony on this point, on which respondents rely, is unpersuasive, since he was only giving his opinion and he is not a chemist. Tr. 267-72, 286-87.[7/] I find that whether or not the concentration of acrolein was sufficiently reduced to make the treated canal water harmless when it flowed into St. Vrain Creek depended upon whether enough acrolein had been neutralized by sodium bisulfite to make it non-toxic.[8/]

The procedure for neutralizing acrolein by sodium bisulfite as an alternative to containing the treated water for six days was not then and is not presently part of the approved labeling of MAGNACIDE "H".[9/]

7/ It is true that a test of a water sample drawn from near the discharge point in the canal disclosed only 0.10 ppm of acrolein. Resp. Ex. 152. But that test was conducted on August 31, 1976, five days after the application and allowance must be made for the loss of acrolein in the interim by hydrolysis. Tr. 477, 605; Resp. Ex. 137.

8/ Dr. Kissel admitted that if the neutralization by sodium bisulfite was incomplete, it was possible that enough acrolein would have remained in the water to kill fish. Tr. 639.

9/ The label for MAGNACIDE "H" refers only to using sodium bisulfite to neutralize "spilled" acrolein, but makes no reference to using it for neutralizing treated water. The label also states that MAGNACIDE "H" should "only be applied in accordance with directions in Magna Bulletin ACD 65-153." That bulletin makes no reference to neutralizing treated water with sodium bisulfite. Resp. Ex. 19.

It is a procedure which is not presently approved by respondent Magna. Tr. 300.[10/] The application involved in this proceeding is the only time respondent Lofland has used or observed the procedure. Tr. 300, 320. Respondent applied the sodium bisulfite by adding it through a hose above the stream near or at the canal's discharge point into the St. Vrain Creek. Tr. 285-338. A good mix of the sodium bisulfite and the treated canal water before the treated water entered the creek was essential in order to make the treatment effective. Resp. Ex. 17. What is necessary to accomplish a good mix is not spelled out in respondent's temporary application manual on which Respondent Lofland relied. See Tr. 275; Resp. Ex. 17. To make an intelligent determination requires a thorough knowledge of the channel-flow characteristics and the application of principals of engineering. Tr. 667-676. Respondent Lofland was not an engineer, and as already noted, did not even have any prior experience in using the sodium bisulfite procedure. Respondent Lofland's inexpert method of application is shown by the fact that he did not even find out from individuals familiar with the canal what the mixing zone in the canal should be for achieving a good mix before the canal water discharged into the creek. Tr. 419. In view of the circumstances of the fish kill following upon the heels of the application and the lack of persuasive evidence that the sodium bisulfite application would be effective, I find that acrolein was discharged in toxic quantities into the creek.

10/Lofland, however, considered the procedure to be approved by Magna at the time he used it. Tr. 304-05.

Respondents suggest that chlorine combined with other effluent discharges from the Lyons sewage treatment plant may have been responsible for the fish kill. The outfall from the sewage treatment plant was upstream from the confluence of the canal with the creek. Tr. 395, Resp. Ex. 1. The possibility that the discharges from the sewage disposal plant caused the fish kill is much less likely than that the fish were killed by acrolein. While there have been a few instances of the sewage discharge exceeding residual chlorine limitations, it has not been shown that they resulted in building up residual chlorine in the creek. Tr. 396, 401.[11/]

Respondents also argue that since some dead fish were found upstream from the Carter Canal, it follows that the dead fish found in the creek could not have been killed by acrolein. The site at which these dead fish were alleged to be found is the Second Avenue bridge in Lyons, which is also above the sewage disposal plant.[12/] Only

---

11/ In March 1977, a grab sample of the sewage effluent discharge disclosed 3.0 mg/l of residual chlorine. Resp. Ex. 35. These samples are taken before the effluent empties into the creek. Respondent argues that if this had occurred on August 26, 1976, with the conditions of volume of discharge and flow of the creek existing on that day, a concentration of about .005 ppm of chlorine would have resulted in the creek, which would allegedly have been fatal to fish. The answer to this is that in the 10 year period prior to August 26, there have been no other known fish kills in the area. Tr. 146-47. Further, on August 21, 1976, when the latest sample prior to August 26 was taken, residual chlorine in the sewage effluent was measured as ranging from 0.5 - 0.75 mg/l, a much lower concentration than 3.0 mg/l. Resp. Ex. 85. There were no known fish kills on that day in the area, nor on any of the succeeding days prior to August 26.

12/ See Resp. Ex. 154.

one dead fish was observed in this area by the officials who made the official investigation. Tr. 72, 722.[13/] No inquiry was made as to the cause of death of this one fish, and its unexplained presence does not detract from the conclusion that the thousands of dead fish found downstream from the canal's discharge point were killed by acrolein contaminated water issuing from the canal.

Respondents further argue that the absence of any dead fish in the canal proves that acrolein could not have killed the fish in the creek. It is respondent's contention that the canal was also a fish bearing water. The evidence discloses, however, that it was most unlikely that Brown Trout in any large number, if at all, were in the canal in August. Tr. 709-17.[14/]

13/ Respondents rely on a newspaper article which reported that a "few" dead fish were found near the Second Avenue bridge. Newspaper reports of events are of doubtful credibility, especially when they are based on the reporter's understanding of his conversations with others. Respondents argue that they have been prejudiced because there was no authority under FIFRA to subpoena the reporter, Mr. Gerson. Respondents were permitted to introduce an affidavit by Mr. Gerson, which does not enhance the credibility of his newspaper story of the fish kill. Mr. Gerson merely states that the article was written on the basis of his own observations, and upon interviews with others, but does not particularize what he may have personally observed. Resp. Ex. 128. It can be assumed from this failure of the affidavit to be more explicit that Mr. Gerson's report of the dead fish at the Second Avenue bridge is not based on firsthand knowledge but on hearsay and it is entitled to little weight, when contrasted with the testimony of the person who was actually present at the time. See Vanity Fair Paper Mills v. FTC, 311 F. 2d 480, 485-86 (2d Cir. 1962).

14/ There was testimony that Brown Trout were found in the highway siphon of the canal near the discharge point in 1957 and 1973, when the canal was drained. Tr. 429-31, 458. Their presence can be explained by the fact that some Brown Trout may have migrated from the creek into the highway siphon in the fall in order to spawn. Tr. 709.

I find, accordingly, that respondents violated FIFRA, Section 12(a)(2)(G), 7 U.S.C. Sec. 136j(a)(2)(G), by discharging water treated with MAGNACIDE "H" into fish bearing waters in less than six days in contravention of the label's directions for use, and using it, therefore, in a manner inconsistent with its labeling.

It is undisputed that respondents did not consult the Fish and Game Agency for the State of Colorado before applying the MAGNACIDE "H". Respondents argue that consultation with the State Fish and Game Agency would have served no useful purpose, asserting that the purpose of the label provision was to insure that the user become thoroughly familiar with the product, and that Lofland had extensively consulted with Federal and State officials to make himself thoroughly familiar. Complainant argues more persuasively that the purpose is to obtain information about the location of fish bearing waters and the drainage flow patterns of the water to be treated. In this case, there appears to be still another reason for consulting with the State Fish and Game Agency before applying the MAGNACIDE "H". When a highly toxic chemical such as MAGNACIDE "H" is applied to waters which drain into fish bearing waters, and it is intended to release the treated water into fish bearing waters in less than the six days required by the label, the State Fish and Game Agency is entitled to be alerted to the potential danger to the fish bearing waters and to be given the opportunity to take steps to guard against or prevent any harm to the fish.

I find, accordingly, that respondents violated FIFRA, Section 12(a)(2)(G), 7 U.S.C. 136j(a)(2)(G), by not consulting with the State Fish and Game Agency before applying MAGNACIDE "H".

The Recommended Penalty

Complainant has requested a $10,000 penalty against Magna and a $5,000 penalty against Lofland. Respondents argue that the penalty is excessive. In addition, respondents for the first time raise the question of whether Lofland's liability is governed by FIFRA, Section 14(a)(1) (7 U.S.C. 136 l(a)(1)) or Section 14(a)(2) (7 U.S.C. 136 l(a)(2)).[15/]

15/ Section 14(a)(1) (7 U.S.C. 136 l(a)(1)) provides:

> (1) In General -- 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.

Section 14(a)(2) (7 U.S.C. 136 l(a)(2)) provides:

> (2) Private Applicator. -- Any private applicator or other person not included in paragraph (1) who violates any provision of this Act subsequent to receiving a written warning from the Administrator or following a citation for a prior violation, may be assessed a civil penalty by the Administrator of not more than $1,000 for each offense.

Section 14(a)(2) was amended by the 1978 Pesticide Act, Sec. 17, 92 Stat. 832, with respect to the liability of applicators. One of the changes was to make certain applicators previously not subject to penalties under Section 14(a)(2) for a first violation, now liable for a penalty of $500 for a first violation. See S. Rep. No. 95-1188, 95th Cong. 2d Sess. 44-45 (1978). Although Lofland applied the product, complainant does not contend that Lofland meets the qualification of and should be assessed penalties under Section 14(a)(1) as a "commercial applicator." The term "commercial applicator" is defined in FIFRA, Section 2(e), 7 U.S.C. 136 2(e), and the definition has been modified by the 1978 Pesticide Act, Section 1, 92 Stat. 819, to provide that certain commercial applicators are not to be considered "distributors" under Section 14(a)(1). The modification does not affect Lofland's liability in this case.

16

Section 14(a)(1) provides for the assessment of civil penalties against "[a]ny registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor." Complainant appears to predicate Lofland's liability under Section 14(a)(1) not upon the grounds that Lofland himself is a distributor but upon his participation in the violation as an employee of Magna, who is a distributor of MAGNACIDE "H".[16/] The applicable language, therefore, is "wholesaler, dealer, retailer or other distributor." The words are not separately defined in FIFRA to include employees, and if employees are to be held liable, it must be for some other reason.

Complainant argues that Section 14(b)(4), 7 U.S.C. 136 l(b)(4) is grounds for making Lofland subject to civil penalty under Section 14(a)(1).[17/] That section clearly establishes the liability of Magna for Lofland's acts, but it does not answer the question of whether sanctions against Lofland are to be imposed under Section 14(a)(1) or Section 14(a)(2).

16/ See Complainant's rely brief at 5.

17/ Reply Brief at 5. Section 14(b)(4), 7 U.S.C. 136 l(b)(4) provides:

> (4) Acts of Officers, Agents, etc. -- When construing and enforcing the provisions of this Act, the act, omission, or failure of any officer, agent, or other person acting for or employed by any person shall in every case be also deemed to be the act, omission, or failure of such person as well as that of the person employed.

The terms "wholesaler", "dealer", and "retailer" normally refer to the entity (corporation, partnership or sole proprietorship) which operates and controls the business enterprise, and it would be giving such terms an unusual meaning to construe them to also include employees. The same construction would also apply to the word "distributor", which relates back to the other terms. The general rule is that words in a statute are to be given their normal meaning, except when this does violence to the statutory objectives, or the legislative history indicates otherwise. Burns v. Alcala, 420 U.S. 575, 580#1-81 (1975).

No reason has been found not to give the pertinent language its normal meaning here. Construing Section 14(a)(1) to impose liability only on employers, who have control over the acts and conduct of their employees, seems to be an adequate method of enforcing FIFRA. No legislative history or even authoritative administrative interpretation has been cited to support complainant's position that employees must also be subject to the same penalty as their employers. I find, accordingly, that although Lofland has clearly violated FIFRA Section 12(a)(2)(G), he is not subject to penalties under Section 14(a)(1). The complaint therefore, as to him must be dismissed, since no penalty is assessable against him under Section 14(a)(2).

Complainant's proposed penalty against Magna was derived from the EPA's published guidelines for the assessment of civil penalties under FIFRA, 39 Fed. Reg. 27711 (1974). Tr. 218.

Magna was estimated to have gross sales in excess of $1 million, and fall in Category V in the penalty assessment schedule in the guidelines. The violations themselves were treated as ones where the adverse effects are highly probable, for which the maximum penalty of $5,000 is proposed. Tr. 218-19.

While the guidelines are to be consulted in assessing a penalty, I am not required to follow them if the penalty derived therefrom does not appear appropriate to the facts of the case. 40 C.F.R 168.46(b). In determining what is an appropriate penalty, FIFRA provides that I am to consider the gravity of the violation, the size of respondent's business and the effect of such proposed penalty on respondent's ability to continue in business. FIFRA, Section 14(a)(3), 7 U.S.C. 136 l(a)(3).

Magna has not asserted that the proposed penalty of $10,000 would adversely affect its business, nor has it claimed that the figure of over $1 million for its gross sales is too high. These factors accordingly are not disputed. Magna's financial condition is a matter within Magna's peculiar knowledge, and the burden was on Magna to come forward with evidence respecting it, if it wished to contest the appropriateness of the proposed penalty on such grounds. See 39 Fed. Reg. 27712.

It remains, then, to consider whether the proposed penalty is justified by the gravity of the violation. Magna has introduced considerable evidence on this issue. In determining the gravity

of the violation, I am to consider Magna's history of compliance with FIFRA and any evidence of Magna's good faith. 40 CFR 168.60(b). Gravity of the violation has also been held to involve the evaluation of two factors: gravity of misconduct and gravity of harm. Amvac Chemical Corp., EPA Notices of Judgment (June 1975), No. 1499 at 986.

It is true, as respondent argues, that this record does not disclose any previous violation by Magna. This fact, however, is given little weight here since what is involved appears to be an intentional disregard of the label's directions on the assumption that some unapproved method could be substituted.

Here the gravity of harm is attested to by the large fish kill. I cannot agree with respondent's argument that the application of MAGNACIDE "H" should be placed in the "Adverse Effects Not Probable" category of the guidelines. The toxicity of the product is unquestioned, and the effectiveness of the sodium bisulfite neutralization in the circumstances under which it was applied here is very much open to question. The evidence does not support respondent's argument that the efforts to neutralize the acrolein enjoyed a high probability of success. Lofland had not previously used sodium bisulfite to neutralize canal water and indeed, the record is barren of any evidence that the procedure followed by Lofland was successfully used to neutralize acrolein in canal water under conditions similar to that existing here.

That Lofland acted in good faith and believed that the acrolein would be made harmless is not questioned, and arguably that should also be considered in determining the gravity of Magna's misconduct. But Lofland's good faith is not enough. Respondents must demonstrate that they used the requisite degree of care to prevent harm. I find that they have not done so, for it has not been shown either that the unapproved method of neutralizing acrolein in canal water with sodium bisulfite was a safe way of using acrolein, or that Lofland had the necessary experience or training to do the sodium bisulfite application successfully.

I, accordingly, find that a penalty of $5,000 should be assessed against Magna for violation of the label's prohibition against releasing treated water into fish bearing waters in less than six days.

The violation with respect to failing to consult the Fish and Game Agency, on the other hand, does not seem to be properly classified as one whose adverse effects are "highly probable." Respondents undoubtedly knew that the St. Vrain Creek was a fish bearing water before they applied MAGNACIDE "H." Indeed, that would appear to be the explanation for attempting to neutralizing the acrolein before it entered the creek. Consequently, it is not likely that consultation with the State Fish and Game Agency would have added anything to respondent's knowledge about the flow of the canal into fish bearing waters which would have caused them to change their method of application. At the same time, neither can the

violation be classified as one whose adverse effects are not probable. Alerting the State Fish and Game Agency to the acrolein application may have resulted in some action by that Agency to prevent or minimize the harm.

Consequently, I find that the appropriate classification for this violation is "Adverse Effects Unknown" for which the proposed penalty for a respondent with a business the size of Magna's is $2,800, 39 Fed. Reg. 27716, and this is the penalty that is assessed for this violation.

Respondents' Procedural Objections

There remains to be disposed of respondents' objection that the presentation of their case was seriously impaired by the lack of subpoena power in FIFRA civil penalty cases and the absence of formal discovery mechanism. The objection is made for the first time in respondents' posthearing brief, and respondents have taken an ambiguous position on it, for they assert that I need not reach this issue "in view of respondents' demonstrated lack of liability for the charges asserted." Respondents have not demonstrated a lack of liability on the part of Magna. The issue is reached and found to be without merit.

Respondents single out as examples of persons who they claim were unavailable as witnesses, Thomas Gerson, a newspaper reporter, for the Lyons Recorder, and William Brackett, the foreman of the Lyons sewage treatment plant.

Respondents appear to have overlooked that they were permitted to put into evidence Mr. Gerson's written statement relating to his newspaper articles about the fish kill, in lieu of having him testify orally. Tr. 469-70. Respondents have not shown that this was an inadequate way by which to present the facts Mr. Gerson would testify to.[18/]

Respondents never contended at the hearing that Mr. Brackett's attendance as a witness was necessary to their case. This prevented consideration being given at the hearing to whether any deficiency in the record which was shown to result from Mr. Brackett's unavailability could not have been corrected by the admission of a written statement from Mr. Brackett, or by stipulation, or by other means, with a minimum of disruption to the hearings. Raising the issue now appears to be more of an afterthought on the part of respondents. Respondents assert generally that Mr. Brackett would testify about chlorine discharges and other dangerous chemicals at the Lyons sewage treatment plant. Respondents did introduce a considerable amount of evidence on the operational difficulties experienced by the Lyons sewage plant.[19/] It was, therefore, incumbent on respondents if

---

18/ Mr. Gerson's written statement was considered but found to be unpersuasive because his knowledge of the fish kill appeared to be principally based on hearsay. Supra at 11, n. 13.

19/ See Resp. Ex. 23-121, Tr. 365-408.

they wish to complain of Mr. Brackett's personal unavailability as a witness at this late date, to show that Mr. Brackett's testimony would have produced material facts which could not have been obtained by other means and would not be simply cumulative. They have not done so, and this confirms that respondents have suffered no real prejudice from Mr. Brackett's asserted unavailability as a witness.

Respondents assert they were not given the prehearing discovery required by "due process." Whether prehearing discovery is a matter of right in administrative proceedings is a question which has not been settled. Compare Silverman v. CFTC, 549 F.2d 28, 33 (7th Cir. 1977), with NLRB v. Rex Disposables, Div. of DHJ Industries, Inc., 494 F. 2d 588 (5th Cir. 1974). The rules of practice governing these proceedings do not provide for prehearing discovery as such, but they do allow for the prehearing exchange of each party's proposed evidence. See 40 CFR 168.36. Such an exchange was made in this case. Respondents have supplied no details as to what specific relevant information would have been uncovered through discovery over and above that furnished to them. It thus appears that respondents' objection is speculative rather than resting on any actual deprivation of due process and it must be rejected.

Finally, respondents have moved for the admission into evidence of certain exhibits. This motion is unopposed by complainant. Exhibits marked as Respondents Exhibits 22 and 133 are received into evidence. The affidavit of Carol Moores, sworn to September 15, 1974,

with the map attached, is received into evidence as Respondent's Exhibit 154. Respondent's Exhibit 19, with a copy of the MAGNACIDE "H" label attached, is substituted for the exhibit previously put in the record. The exhibit which has been replaced is renumbered Respondent's Exhibit 19A.

FINAL ORDER[20/]

Pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act, Section 14(a)(1) (7 U.S.C. 136l (a)(1), a civil penalty of $7,800 is assessed against respondent Magna Corporation for the violations which have been established on the complaint issued on November 29, 1977. The complaint is dismissed as to respondent Michael Lofland.

Gerald Harwood
Gerald Harwood
Administrative Law Judge

November 14, 1978

20/ Unless an appeal is taken by the filing of exceptions pursuant to Section 168.51 of the rules of practice, 40 CFR 168.51, or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Administrator. See 40 CFR 168.46(c).

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Initial Decision was sent Certified Mail, Return Receipt Requested, to:

Alan E. Boles, Jr., Esquire
Holland & Hart
P.O. Box 8749
Denver, Colorado 80201

and handcarried to:

Gregory T. Halbert, Attorney
Enforcement Division
EPA, Region VIII
1860 Lincoln Street
Denver, Colorado 80295

and

Alan Merson
Regional Administrator
EPA, Region VIII
1860 Lincoln Street
Denver, Colorado 80295

on this 17th day of November, 1978.

Virginia C. Burns
Regional Hearing Clerk