



DACONIL 2787[®] **Pours it to nine fungus diseases.**

Broad-spectrum Daconil 2787 fungicide controls nearly all fungus diseases found on golf greens, tees and fairways, as well as many ornamentals.

It is highly effective against brown patch, copper spot, dollar spot and Helminthosporium in the spring and fall.

And now Daconil 2787 is available in either a convenient flowable or a wettable powder formulation.

Excellent turf tolerance permits use right on through the hot summer months.

Tested and used successfully on at least 35 species and varieties of turfgrasses, including all major bluegrasses, bentgrasses, bermudagrasses, ryegrass, fescuegrass, Dichrona and zoysiagrass. Can be used on new seedings and established turf.

Follow the Diamond Shamrock Turf Care System for professional turf care over your entire golf course. Many of the leading country clubs across the nation already do.

Contact your turf chemicals supplier or write the Diamond Shamrock Agricultural Chemicals Division sales office nearest you.



**Diamond
Shamrock**

The resourceful company.

SALES OFFICES: Three Commerce Park Square, 23200 Chagrin Blvd., Beachwood, Ohio 44112 • 1401 W. Paces Ferry Rd., NW, Atlanta, GA 30327 • 5333 Westheimer, Suite 850, Houston, Texas 77002 • Commerce Plaza Bldg., 2015 Spring Rd., Oakbrook, Ill. 60521 • 617 Veterans Blvd., Redwood City, Calif. 94063

EPA: Understanding enforcement

by Gail Hogan

"I would get up and make speeches and people would throw rocks at me and say, 'You mean if we use less than the pesticide that's on the label to control the pest, you're going to sue us?' And I would say, 'No, we're not!' And nobody would believe me."

So you think you have problems with the enforcement arm of the EPA? The above statement was made in an exclusive interview with Augustine Conroy II, director of the pesticides and toxic substances division of the office of the Assistant Administrator for EPA Enforcement. Other officials made similar comments.

Conroy was referring to the misunderstandings that resulted from amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), misunderstandings that, in part, exist today.

The amendments, signed into law by the President on October of 1972, strengthened the vague FIFRA.

The new amendments prohibited any person from using any registered pesticide "in a manner inconsistent with its labeling," provided for classification of pesticides into "general" and "restricted" categories, limited those who could apply "restricted" pesticides, and gave EPA new powers of enforcement such as stop sale and removal orders, the power to initiate seizure

actions, the authority to require manufacturers to register pesticide producing establishments, and the power to initiate civil or criminal proceedings against violators.

In the years that followed, EPA's enforcement arm focused its strategy on ensuring compliance of manufacturers and users through producer establishment inspections, pesticide sampling, pesticide analysis and use surveillance.

With their strengthened powers, EPA was able to "clean up the industry," according to Conroy. "With the ability to initiate civil penalties for pre-market clearance of pesticides, we were able to turn around violations and fine companies in 60 to 90 days. When we could only initiate criminal penalties it would take about 18 months, as we had to go through the U.S. Attorney and the Justice Department."

Civil cases involving registration and labeling are handled in EPA offices. If the violator wants a hearing, he is entitled to one. The EPA Administrative Law Judge hears both sides of the case. He then submits his decision to the regional administrator (there are ten). Appeals go through the Appellate Court in the violator's district.

"Industry is pretty well on board and they know what they're doing now and so do we," Conroy emphasizes. "We used to have something like 300 violations of non-registered pesticides a year. Now we're down to 25, and I think that comes about as a result of our enforcing the statute the way it was intended to be.

"We've cleaned up. They (manufacturers) are shipping out products that are registered and they are labeled more or less the way they should be. That doesn't mean that I agree they ought to be registered in the first place," he adds.

But the other enforcement aspect, user violation, is another story. Of the 72 amendments over jurisdiction, only one applies and it does so with the phrase, "anyone who uses a registered pesticide inconsistent with its labeling is in violation." This, says Conroy, is a very, very limited jurisdiction.

EPA has taken a narrow view of the inconsistent phrase, Conroy says. "We interpreted it to mean exactly what it says. If you use a pesticide in any other way than on the label, it's a violation.

"That's when I got those rocks thrown at me. I was trying to explain that, yes, not using enough was a violation, but we were using discretion and saying we won't prosecute you for that. We were going to take these violators on a case-by-case basis."

The EPA decided to get this

Continued on page 17



OSHA: A businessman's guide

by Anthony J. Obadal

proceed with the outline of the three major areas of OSHA law.

The general duty clause

The principle case interpreting Section 5(a) (1), the "general duty clause," is found in the federal court case *National Realty & Construction Company v. OSAHRC*. No effort to understand the Act can be complete without a knowledge of this case.

In *National Realty* the government charged an employer with a violation of his duty to "furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or likely to cause death or serious physical harm to his employees," charging that the employer had permitted an employer to ride on the running board of a front-end loader. That rather simple factual case gave rise to a significant opinion by the United States Court of Appeals for the District of Columbia, which concluded that while employers have a duty to do everything possible to prevent hazardous conduct by employers, that duty does not extend so far as to mandate that the employer be guarantor of employer conduct.

The court went on to elaborate upon the elements necessary for a general duty violation. First, a recognized hazard must be one within the common knowledge of safety experts in the industry or known as a hazard by the particular employer. For example, does your experience as an employer provide you with knowledge of any particu-

larly hazardous work? In one case, *Brennan v. OSAHRC* and *Vy Lactos Laboratories, Inc.*, the court concluded that an employer's tests which demonstrated damage was sufficient for knowledge of a hazard, even though no specific industry code or standard was involved.

The *National Realty* court also found that precautions to correct the recognized hazard must be feasible. This feasibility test was articulated in following, often-quoted language, when the court said that because of the broad definition of the general duty clause: The Secretary (of Labor) must be constrained to specify the particular steps a cited employer should have taken to avoid the citation, and to demonstrate the feasibility and likely utility of those measures.

The court went on to say: Only by requiring the Secretary (of Labor) at the hearing to formulate and defend his own theory of what a cited defendant should have to do, can the Commission and the Courts assure even handed enforcement of this clause.

The summary, the *National Realty* court stopped short of imposing an absolute duty on employers to prevent accidents. However, it did recognize that final responsibility for safety rests with the employer and that that duty cannot be waived or diminished by such factors as contributory negligence or assumption of risk on the part of your employees. Furthermore, employers should note that among the feasible precautions that they

Continued on page 18

The Occupational Safety and Health Act of 1970 became effective on April 28, 1971. That date marked the end of another protracted battle between business and labor interests. The date also, however, marked the beginning of a continuing series of skirmishes concerning the application and interpretation of the Act. These encounters occur at the rulemaking level, on the jobsite, before administrative law judges and the Occupational Safety and Health Review Commission, and in the federal courts. Additionally, battles are fought in Congress over the enactment of possible amendments to the Act.

Clearly, numerous legal issues arise under this Act which are of vital concern to employers. This is a short summary of what you, as employers, can do to protect yourselves from becoming entangled in the intricacies of OSHA. But be forewarned, this is not a do-it-yourself course in how to avoid OSHA problems. It is not a substitute for a sound health and safety program and appropriate legal advice. With that reservation in mind, let us



Diazinon controls more any other major

Over twenty turf insects are listed on the Diazinon® label. More than any other major turf insecticide.

Granted, a turf manager must be able to recognize an insect problem. And know when to apply treatment for the most effective control.

But when you've got Diazinon, the one broad-spectrum turf insecticide with the label to prove it works for you, it sure makes things easier.

The insects: Lawn chinch bugs, Ants, Armyworms, Clover mites, Springtails (Collembola), Crickets,



turf insects than turf insecticide.

Cutworms, Digger wasps, Earwigs, Frit flies, Lawn billbugs, Sod webworms (Lawn moth), Sowbugs, White grubs (such as Japanese beetle larvae), Brown dog ticks, Bermuda mites, Chiggers, Fleas, Leafhoppers, Millipedes, Rhodes-grass scales.

If you'd like to have a copy of the Diazinon label, pick up one from your local supplier.

Or write us.

Agricultural Division, CIBA-GEIGY Corporation, P.O. Box 11422, Greensboro, NC 27409

Diazinon

**FOR
MICKEY MANTLE
AND
WHITEY FORD,**

Adelphi
KENTUCKY BLUEGRASS

(U.S. Plant Patent No. 3150)

**IS "A WHOLE NEW
BALL GAME"**



Photography at McGOVERN SOD FARMS, Melville, N.Y.

**RATED OUTSTANDING FOR OVERALL PERFORMANCE
... IN YEARS OF UNIVERSITY TESTING
... IN ACTUAL USE BY PEOPLE WHO KNOW GREAT GRASS,
GROW GREAT GRASS and DEMAND GREAT GRASS.**

Nowadays it's more golf than baseball but Mickey Mantle and Whitey Ford know great grass. Whatever the game, "Adelphi" is the answer for them and it may be for you.

- **DARKER GREEN COLOR THE ENTIRE GROWING SEASON**
- **EXCELLENT DENSITY** • **GOOD DISEASE RESISTANCE**
- **TOLERANCE TO MODERATELY CLOSE MOWING**

**JOIN THE "ADELPHI" TEAM.
IT'S "A WHOLE NEW BALL GAME" IN TURF.**

FOR INFORMATION, CONTACT:


J & L ADIKES, Inc.
Jamaica, N.Y. 11423

JONATHAN GREEN & SONS
Farmingdale, N.J. 07727

NORTHRUP, KING & CO., Inc.
Minneapolis, Minn. 55413

VAUGHAN-JACKLIN CORP.

Bound Brook, N.J. 08805 • Downers Grove, Ill. 60515



"ADELPHI" HAS BEEN CHOSEN by the Plant Variety Protection Office, U.S.D.A., AS A STANDARD FOR DARK GREEN COLOR to which all bluegrasses applying for plant protection will be compared for color classification.

(Use of this statement does not indicate any approval or recommendation of Adelphi by the U.S.D.A.)

Canadian Inquiries: **National-NK Seeds Ltd.**, Box 485, Kitchener, Ont. • **Rothwell Seeds Ltd.**, Box 511, Lindsay, Ont.
Other International Inquiries: **Northrup, King & Co., Inc.**, Minneapolis, Minn. 55413

enforcement

Continued from page 12

word out in print. Two years ago they began putting out a series of Pesticide Enforcement Policy Statements (PEPS). "This was our way of telling the consumer ahead of time how we felt about something," explains Conroy. "For example, if you're using less than the label dosage and it's effective, we aren't going to prosecute you for that."

What is the status of user violation enforcement today? EPA now

has a Pesticide Misuse Review Committee (PMRC) established for the purpose of reviewing each case of alleged misuse. Allegations may come from one of the ten EPA regional enforcement offices, the EPA surveillance program, FDA residual reports, USDA residual reports, other government reports, trade groups or private citizens.

The PMRC consists of personnel from the Agency's Office of General Counsel, Office of Enforcement, and the Office of Pesticide Programs.

The committee's responsibilities

include determining whether a registered pesticide has been misused, what level of enforcement action is warranted, whether the FIFRA is being applied in misuse cases, whether patterns of misuse are identifiable and if label or registration amendments are needed for specific pesticides or classes of pesticide products.

Conroy puts the PMRC this way. "We all three sit down at a table and say, 'Hey, that is a violation of the inconsistent statute because of this reason or this reason and because it's so serious, we think it ought to go to criminal court. Or because it's not quite so serious that we should take civil action, or maybe just send a warning letter.'"

The results of the committee are then sent to the regional office involved who proceeds with the action. Conroy says the EPA is now in a formulative stage in the area of pesticide misuse cases. "Now we want to see all cases as they occur so that we can devise policies and guideline on how to handle them with the idea of eventually turning these responsibilities over to the regional administrators."

To date there have been 211 cases of user misuse. Figures on the penalties were not available, but the penalties are as follows:

User violators fall into two categories — noncommercial and commercial (commercial applicators, producers, manufacturers). In noncommercial civil action cases, violators receive a warning letter for the first offense, and for the second offense a possible fine of up to \$1000. In a criminal action the violator may be fined \$1000 and receive a 30-day jail sentence.

For commercial violators, a civil action penalty can be a fine of up to \$5000. For a convicted criminal violator, the penalty can be a fine of up to \$25,000 and a one-year jail term.

But, points out Conroy, for a misuse case to reach criminal court, there has to be a knowing violation with very serious consequences such as a death. (See box.) To date the EPA has collected ten million dollars for pesticide violators, both manufacturers and users. Where has the money gone? That's another story. □

PMRC Case No. 18

The case involved the use of OLIN PARATHION 2 percent DUST on a watermelon crop near Nixon TX on June 22, 1974. Three teenagers were instructed by the property owner to apply the insecticide (by shaking a burlap bag) containing the pesticide over the watermelon plants.

The boys were equipped only with respirators and were dressed in lightweight shirts and trousers. They did not wear gloves, goggles or other clothing to protect exposed skin and eyes as required by the products labelling.

The owner supervised the dusting program operation for one hour before leaving. Later, the boys began removing their respirators while continuing to work.

An hour later one of the three boys became seriously ill and was taken to a doctor's office where he was pronounced dead from acute pesticide poisoning. The second boy recovered from the exposure after hospital treatment, while the third boy, the last to remove his equipment, showed no symptom of poisoning.

The labelling of the pesticide a) contained signal words "Danger" and "Poison" with skull and cross bones insignia, warning of the product's toxicity, its danger to humans upon inhalation and swallowing, and absorption through exposed skin or eyes; and b) prescribed the use of rubber gloves, protective clothing, goggles, and mask or respirator; and c) listed antidote and treatment instructions in the event of poisoning symptoms.

The manager of the local feed store, where the pesticide was purchased, stated that he had reviewed the labelling thoroughly with the crop owner. The crop owner also reviewed the labelling and instructions with the hired boys. The owner was clearly knowledgeable of the product's labelling prohibition's regarding human exposure and the requirements for protective clothing.

The PMRC determined that the owner knowingly instructed the use of the parathion in a manner inconsistent with warnings and cautions on the product labelling. Further, the owner, in his capacity as supervisor of the three boys, failed to insure that proper precautions were maintained throughout the pesticide's application. The committee recommended that criminal prosecution of the crop owner should be pursued under FIFRA section 14 (b) (2) for the use of a registered pesticide in violation of section 12(a) (2) (G). On March 12, 1975, the EPA office in Region VI referred the case to the U.S. Attorney recommending criminal prosecution of the crop owner.

The defendant entered a plea of no contest and was fined \$250.

OSHA guide

Continued from page 13

must take care in hiring and adequate training to prevent injury. By following these steps you provide safety for your employees and your attorney with a major line of defense in many situations when you contest an OSHA citation.

The court skirted the interesting and vitally important issue of whether the general duty clause is so vague as to violate the due process requirement of the Fifth Amendment. The issue was originally raised in 1970, when the Minority Report asserted that the Act did not provide, as laws must, a clear path along which those who must comply can travel. The unfair feature of Sec-

S. Court of Appeals for the Fifth Circuit said: "If employers are told that they are liable for violations regardless of the degree of their efforts to comply, it can only tend to discourage such efforts . . ." *Horne Plumbing and Heating Company v. OSAHRC & Dunlop*.

The specific standard clause

Section 5(a) (2) of the Act delegates the Secretary of Labor the power to set specific standards. There are two methods by which this activity could occur. The first gave the Secretary authority for a two-year period to adopt and promulgate, without public rule-making, all existing federal safety and health standards and existing national consensus standards relating to safety and health. This authority has expired.

It is only after OSHA cites an employer that he is made aware of what was expected of him to do to avoid violating the Act.

tion 5(a) (1) is that there are no criteria available to advise employers, in advance, of what is required of them. It is only after OSHA cites an employer that he is made aware of what was expected of him to do to avoid violating the Act. Many attorneys believe that this issue must ultimately be resolved by the Supreme Court.

To summarize the general duty clause, here are a few principles which have evolved out of the general duty cases. Where an accident results from unforeseeable employee negligence or misconduct, there may be no violation. Similarly, where an employee acts contrary to repeated warnings about safe operating techniques, there may be no violation. However, where an employer acts contrary to employer's safety rules which are not enforced, there probably will be violation. Finally, the showing of a hazard without a showing of feasible corrective measures, is insufficient to sustain a violation.

While the employer's burden is heavy, the Courts recognize reasonable limits on that burden. As the U.

The second method provides for the setting of standards by means of the rulemaking procedure, which involves public notice and informal hearings. It is under this latter authority that the standards for maintenance of utility lines has been promulgated. Employers and associations should take advantage of their right to participate in the process of making standards which affect your business or industry. Failure to do so might mean that your side of the issue may never be aired, with unfavorable standards as a consequence.

Even when unfavorable standards are promulgated, they may be challenged in the courts. Both business and labor have had success in this regard. For instance, Bethlehem Steel Corporation filed suit in the U. S. Court of Appeals for the Third Circuit, challenging the validity of a paragraph in the OSHA regulations relating to industrial slings, on the grounds that affected parties had not received adequate notice and opportunity to comment. The court vacated the standard and remanded the case to the Secretary

of Labor, where the standard was later deleted. *Bethlehem Steel Corp. v. Dunlop*.

Employers may also challenge a specific standard as a defense during a contest to a citation, arguing that it is unenforceable because it is unreasonable on the grounds of vagueness. *Modern Automotive Service, Inc.*

In *Hoffman Construction Company v. OSAHRC & Dunlop*, the OSHA "personal protective equipment" standard which states (t)he employer is responsible for requiring the wearing of appropriate personal protective equipment in all operations where there is an exposure to hazardous conditions . . . The employer, who was cited because his workers were not wearing safety belts when working above the ground, argued that the standard was so vague that no employer could reasonably be advised of the kind of conduct required to achieve compliance. The employer won. However, other Circuit Courts of Appeals have upheld the personal protective equipment standard as not being void for vagueness.

There are, in addition to attacking a standard's interpretation as vague, a number of other important issues which you should be acquainted with regarding specific standard citations. In the first place, just the showing of a standards breach is not sufficient for a violation. This is not a strict liability situation, similar to what is developing in tort law. The Secretary of Labor must not only establish that a breach of a specific standard occurred but that the employer knew or "with the exercise of reasonable diligence, should have known of the existence of the violation." *North American Rockwell Corp.* Here the Review Commission held that the existence of airborne asbestos fibers in excess of the health regulations was not a violation. The Seventh Circuit affirmed, stating that: It was not the purpose of the Act to make an employer an insurer of the safety of his men. . . The employer's task is difficult enough without adding responsibility for potentially hazardous conduct of which the employer is unaware. . .

The Ninth Circuit followed this reasoning in *Brennan v. OSAHRC and Alsea Lumber Co.* when it held that an element of proof of both serious and nonserious violations is knowledge. Furthermore, the onus is on the Secretary of Labor to come forward with the proof and not on the employer to demonstrate his lack of knowledge. The Court said: "To revive the citation . . . would be to subject an employer to a standard of strict liability, under the special duty clause, for deliberate employee misconduct. We do not find that result to be within the intent of the Congress."

Businessmen involved in tree trimming should be aware of a 1975 case in which the Review Commission ruled that the use of ballistic nylon leggings by employees where clearing a wooded area was not required under the Act. The use of such chaps was not the custom in the industry and therefore not required. *Asplundh Tree Expert Company*.

Some major OSHA principles and developments

Search Warrants

Are announced OSHA inspections of the workplace without search warrants permitted by the Fourth Amendment of the U. S. Constitution? The Supreme Court is now considering this issue in *Barlow's, Inc. v. Usery*.

The case arose when the employer barred an OSHA compliance officer from inspecting his premises on the grounds the government did not have a search warrant. OSHA sought a federal court order compelling inspection. The Court refused, stating that the action "is unconstitutional and void in that it directly offends against the prohibition of the Fourth Amendment of the Constitution of the United States of America," which guards against government searches without warrants first obtained upon a showing a probable cause to believe that a violation has been committed. If the Supreme Court upholds the decision, OSHA would be barred access to worksites where it could not receive permission from

a federal judge. The effect would eliminate warrantless OSHA inspections unless consented to by the employer.

Right to a jury trial

Pending before the U. S. Supreme Court are two cases where the employers have argued that the Act is violative of the Seventh Amendment to the U. S. Constitution in that jury trials are not allowed on the existence of a violation. *Frank Irey, Jr., Inc. v. OSAHRC and Atlas Roofing Co., Inc. v. OSAHRC*. Last year similar Federal Coal Mine Health and Safety Act penalties were upheld by the Court as civil in nature and requests for jury trials were denied.

Refusals by employees of allegedly unsafe work

In *Usery v. Whirlpool Corp.* employees refused to clean a large guard screen over a conveyor. They were given written reprimands and lost six hours pay. The court rejected the employees' suit and invalidated a Department of Labor regulation, which justified their walking off the job, as inconsistent with Congress' interest when it passed the Act. See *Dunlop v. Daniel Construction Co., Inc.*

However, there is more recent authority to the contrary. In *Usery v. The Babcock and Wilcox Co.* a federal court held that the Act prohibits an employer from discharging employees for refusing to perform work assignments which they believe to be dangerous. Thus, until this issue is resolved by the Supreme Court or the U. S. Courts of Appeals having jurisdiction in your geographic area, be wary of reprimanding any employees for refusing work on safety grounds.

Employer liability for employee refusal to comply with safety standards

In two cases where employers took all steps, short of termination, to educate their employees to wear hard hats, the Courts of Appeals held that they were still liable for their employees' refusal to wear the hats. *Atlantic & Gulf Stevedores, Inc. v. OSAHRC and ITO Corp. v.*

OSAHRC and Usery. Thus, employees must, to avoid citations under the Act take all steps in their power to obtain employer compliance. The cases make clear that these steps include suspension and discharge if necessary.

Do not interfere with an investigation

The federal court in Massachusetts issued an order restraining a firm from discriminating against or threatening any of its employers who cooperated with an investigation of alleged violations. *Usery v. New England Telephone & Telegraph Co.* The firm's actions? According to the Department of Labor's complaint, a plant manager and an attorney told two employees not to speak with any investigators who were preparing for a hearing outside of the presence of a company attorney. Similarly, imposing a fine upon an employee for filing a safety complaint is also a violation of the Act. In *Dunlop v. Trumbull Asphalt Co., Inc.*, the court ordered the firm to rehire the employee and pay him his back salary from date of discharge to date of the court decision.

Conclusion

This brief review should acquaint you with some of the major principles of the Act which substantially affect employers' interest. The review is merely a tool to assist you in complying and showing your compliance with the Act. A creative safety and health program ultimately is the best defense to a charge of an OSHA violation. □

Anthony J. Obdal is an attorney with the firm Zimmerman and Obdal, 1101, 1101 15th St. N.W., Washington, D.C.

Fact: A Fungicide Insurance that Doesn't Cost...it Pays

Exhalt[®]800

Now, from the Trimec people, the Sticker-Extender that protects your fungicide investment, may even double or triple its effective life and reduce costs proportionately. Read why you shouldn't spray without it.

Applying fungicides is one thing. Keeping them on turf and foliage in working strength through drenching rains, irrigation and weathering—that's the challenge!

Exhalt800 is the answer. It's Gordon's Sticker-Extender that works full time. Prolongs fungicide life. Permits applications using minimum label recommendations. Resists wash-off and weather erosion. It's a fascinating story.

Exhalt800 encapsulates and sticks fungicides to turf and foliage, essentially on contact. It flexes with leaf growth, releases fungicide slowly, lets plant

"breathe" — extends the control period up to 300%.

Even if it rains an hour after application, you still get full extender activity — full fungicide effectiveness. With less wash-off, less build-up in soil to threaten the environment.

And your savings during a season can be substantial. Because you'll use less fungicide with each spray, apply fewer sprays, while greatly extending the control period of each.

University field tests using leading fungicides have proved it: Exhalt800 added to a minimum label spray formulation gives control equal to higher recommendations without Exhalt800. At higher dosages, you may double or even triple the effective control period, with proportionate savings. Results may vary, depending on the fungicide used.

Exhalt800 is low in cost, but it goes a long way. Mix one pint to each 100

gallons in the spray tank. It won't damage turf, trees and ornamentals when used as directed. And, it's easy to use — just add to spray tank and agitate. If frozen, it won't separate; may be thawed and used.

Easy clean-up. After spraying, rinse equipment with water. Residue won't clog nozzles or damage equipment.

With such an impressive number of proven benefits, at least two are paramount: (1) Insuring your fungicide investment, and (2) saving money. *Even as you read this, your spray dollars may literally be washing away!*



As an efficient business manager, can you ignore the overwhelming evidence in favor of Exhalt800? Shouldn't you at least try it and make your own judgement?

Call your authorized Gordon distributor today. It could be the most profitable call you'll make.

