

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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In the Matter of)
Sta-Lube, Incorporated,) Docket No. FIFRA-09-0407-C-84-40
Respondent)

1. FIFRA - Civil Penalties - Claim that a person acted with due care in not registering a pesticide and a pesticide producing establishment rejected where person failed to familiarize himself with the applicable regulatory requirements, and relied instead on the advice from an EPA employee not shown to be authorized to speak on FIFRA's registration requirements and where the advice was inconsistent with other facts the person had knowledge of.
2. FIFRA - Civil Penalties - Due care not established by fact that similar products by other companies were also not registered under FIFRA.
3. FIFRA-Civil Penalties - Penalties for failure to register a pesticide and a pesticide producing establishment assessed not on the basis of the potential for harm of the unregistered pesticide but on the importance of registration to the enforcement of FIFRA.

Appearances:

David M. Jones, Esquire, U.S. Environmental Protection Agency,
Region IX, 215 Fremont Street, San Francisco, CA 94105

Mr. Glenn Johnson, Assistant Secretary, Sta-Lube, Inc.,
3039 Ana Street, Compton, CA 90224

INITIAL DECISION

This is a proceeding under the Federal Insecticide, Fungicide and Rodenticide Act, as amended ("FIFRA"), section 14(a)(1), 7 U.S.C. 136 1 (a)(1) for assessment of a civil penalty for alleged violations of the Act. 1/

A complaint was issued against Respondent, Sta-Lube, Incorporated on July 18, 1984, charging Respondent with selling a non-registered pesticide in violation of FIFRA, section 12(a)(1)(A), 7 U.S.C. 136 j(a) (1)(A), and with not registering the establishment at which the pesticide was produced, in violation of FIFRA, section 12(a)(a)(L), 7 U.S.C. 136 j(a)(2)(L). A penalty of \$4,000 was proposed. Respondent answered and admitted that it sold the fuel additive, STA-LUBE ANTI-MICROBIAL DIESEL CONDITIONER, which it had registered as a fuel additive but not as a pesticide. It claimed that the EPA should be estopped from requiring the product to be registered as a pesticide, denied that the product was a pesticide and contended that, in any event, no penalty was warranted. A hearing was requested.

Thereafter a hearing was held in Los Angeles on January 29, 1985. Following the hearing both parties submitted briefs on the legal and

1/ FIFRA, section 14(a)(1) provides as follows:

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.

factual issues. On consideration of the entire record and the briefs of the parties, a penalty of \$4,000 is assessed.

Findings, Discussion and Conclusion

The facts with respect to the violation are not disputed and can be summarized as follows:

Sta-Lube, a California corporation, with a place of business at Compton, California, is a manufacturer of lubricants and other chemical specialties. Among its products, it produces and distributes the product STA-LUBE ANTI-MICROBIAL DIESEL FUEL CONDITIONER which, as its name implies, is sold for use in marine and motor vehicle diesel fuel. Included in the claims made on the label of STA-LUBE ANTI-MICROBIAL DIESEL FUEL CONDITIONER are that it "kills fungi & controls sludge in diesel fuel" and that it "controls micro-organisms in diesel fuel." Although these pesticidal claims clearly make the product a pesticide within the meaning of FIFRA, section 2(u), and the applicable regulations, 40 C.F.R. 162.3(ff), the product has not been registered with the EPA as a pesticide, and Sta-Lube's facility at which it is produced has not been registered as a pesticide producing establishment. 2/

Sta-Lube does not contest the violation as established by the above facts, but opposes the EPA's proposed penalty of \$4,000. Complainant, following the guidelines issued by the EPA for assessing penalties under FIFRA, section 14(a), 39 Fed. Reg. 27711 (July 31, 1974), has classified

2/ Transcript of Proceedings ("Tr") 6-7, 15; Complainant's Exh. 3. The word "directs" at Tr. p. 6, line 12, should read "distributes" and is corrected to so read. The stipulated facts set out at Tr. 6-7, were intended to incorporate the factual findings in Part A of my order denying motion for accelerated decision issued on December 17, 1984.

Sta-Lube's violations as acts done by Sta-Lube without knowledge of the regulatory requirements and, for a company of Sta-Lube's size, has proposed a penalty of \$2,200 for the non-registration of the product and \$1,800 for the non-registration of the establishment. 3/ Sta-Lube contends that a penalty of \$4,000 is excessive, claiming that it acted in good faith reliance on advice given to it by an EPA employee that the only registration required was as a fuel additive, and that the violations presented no potential threat to the environment. According to Sta-Lube, these are grounds for reducing the penalty, if not under the guidelines, then under the statute, which requires that the gravity of the offense be considered in assessing any penalty and permits the Administrator to issue a warning in lieu of a penalty when the violation did not cause significant harm to the environment. See FIFRA, section 14(a)(4).

The facts to support Sta-Lube's good faith defense can be summarized as follows:

STA-LUBE ANTI-MICROBIAL DIESEL FUEL CONDITIONER is the first pesticide that Sta-Lube has marketed. Previously, however, it had registered with the EPA's Environmental Monitoring Systems Laboratory, another fuel additive that was similar in composition to the anti-microbial diesel fuel conditioner but without the anti-microbial properties. Such registration is required by EPA's regulations for registration of fuels and fuel additives, 40 C.F.R. 79.1 et seq. Sta-Lube's employee, Nelson Alley, who had the responsibility for properly registering the product decided that the only registration required again was as a fuel additive with

3/ Tr. 7; see also 39 Fed. Reg. 27713, 27717.

the EPA's Environmental Monitoring Systems Laboratory. He summed up his reasons for his decision as follows:

There were two reasons why I knew we had to register with the EPA. First the product was a fuel additive and we had previously registered a similar Diesel Fuel Conditioner with the EPA's Environmental Monitoring Systems Laboratory in North Carolina. And secondly, the additive Biobor was being used in the product to give it the claimed biocidal properties. I was aware that Biobor was a registered pesticide with an EPA Reg. No. of 1624-71.

I registered the product with the EPA on EPA form EPA (DUR) 365 (Rev. 11-77). One of the purposes listed was "Biocide. 6.8% Biobor JF along with its EPA registration number was listed under chemical composition. I had already cleared with U.S. Borax, the manufacturer of Biobor, to use their existing data if necessary.

I was unaware that I had to register the product with two different departments within the EPA. This is Sta-Lube's and my first experience with a pesticide product registration.

Although I knew that fuel additives did not receive Registration numbers, I was expecting one here because of the biocide claims and because Biobor had a number. When the EPA notified us that our product was registered but no number was included, I wrote back to ask whether the number was needed. The EPA's response was that it was not needed. I then spoke with Anne Futnell at the EPA to make sure that no other registration was needed. She said it was not since it was a fuel additive to be consumed in combustion.

I then observed that all the other small package fuel additives that I found claiming to either kill, inhibit, or prevent fungi, or algae, or bacteria did not have EPA Reg. numbers. I finally concluded that Biobor must be classified differently, as a pure biocide. 4/

Sta-Lube argues that Mr. Alley's statement demonstrated that he acted with due care. The record, however does not support Sta-Lube's position.

4/ Respondent's Exh. 7. See also Respondent's Exhs. 2, 3, 5 and 6.

In the first place, it is not at all clear that Ms. Futnell, on whose advice Mr. Alley says he relied, really understood what was being asked. On this point, Mr. Alley testified as follows (Tr. 56-58):

Q [By Mr. Jones] All right. Now, going on to Exhibit 2, Mr. Alley, would you identify the form that is used here?

A [Mr. Alley] This is the same kind of informal form that I frequently use.

* * *

Q What prompted this communication?

A Well, because I still had the feeling that we probably should have an EPA number for our product.

Q You just wanted an abstract number?

A No. No. An EPA number, not an abstract number.

Q An EPA number representing what, Mr. Alley?

A Representing an acknowledgement by the Environmental Protection Agency that our product was duly registered as, let's say, Biobor would be.

* * *

Q And if you look on the right-hand side of the document, is this the response that you received?

A That's right.

Q And is that the same message at the top of the right-hand side as at the bottom right-hand side?

A No. She wrote back indicating that the fuel section does not assign numbers. Okay. We had never gotten

a number before. So I called her up to find out do we need to go within EPA any further to obtain a number for our product, and she indicated no, that we had all the registration that's [sic] we needed within EPA.

So at that point I stopped.

* * *

JUDGE HARWOOD: Do you think Ms. Futnell was aware that you were referring to a pesticide registration? I mean, how would you identify the number?

THE WITNESS: Okay. I didn't identify the number, but I called attention to the fact that we do -- that we did have a biocide within this product. Okay. Now, I did not associate pesticide with our product at that time. I regarded it as simply a fuel additive. And remembering again to what we had in our products, I mean, I sent back again all our ingredients and does any of that trigger a need for us to go further in registration and they said no. Now, I didn't come out and say, "Do we need to register this as a pesticide?" No, I didn't come out with that.

The testimony indicates that it is questionable whether Ms. Futnell, in fact, understood that Alley was asking for advice on whether the product should be registered as a pesticide or understood him only to be asking whether a registration number is assigned on the registration of a fuel additive. She could reasonably believe the latter, since she dealt only with the registration of fuel additives. A person who wants to rely on advice given by another should be careful enough in his

inquiry to ensure that the person giving the advice understood what information was being sought. That has not been shown to have been the case here.

Sta-Lube argues that Alley was reasonable in assuming in his inquiries to Ms. Futnell that the EPA was a "monolithic" organization and one registration would take care of all requirements. 5/ The Agency's rules, however, specifically provide that applications to register pesticides are made to the Registration Division of the Office of Pesticide Programs, which is a different office inside the EPA than the one that had handled Sta-Lube's registration of fuels and fuel additives. 6/ This should have put Sta-Lube on notice that possibly he would not be getting the correct advice from the Environmental Monitoring Systems Laboratory. Alley admits to having little knowledge of the regulations saying he does not have time to read them all. 7/ Inasmuch as the purpose of publishing the regulations is to provide the public with notice of an agency's procedures, a person cannot be said to have acted with due care if he simply disregards the applicable regulations.

Alley should, in any event, have been put on notice that he may not be getting correct advice from Ms. Futnell by the fact that she gave no real explanation as to why BIOBOR did have a pesticide registration number. Alley was aware enough of the requirements of FIFRA to obtain the permission of BIOBOR's manufacturer to use its existing data, and he

5/ See Tr. 18.

6/ See 40 C.F.R. 162.41.

7/ See Tr. 67, 98.

also obtained permission from the manufacture to disclose that BIOBOR with its FIFRA registration number was an ingredient in Sta-Lube's product. 8/ It would seem that a person who was conscientiously trying to comply with the law would have made a more thorough inquiry in order to clear up the apparent inconsistency between the advice he was given by Ms. Futnell and the disclosure of a FIFRA registration number on BIOBOR's label. Instead, Alley concluded on the basis of his own very limited knowledge of the law, even before his conversation with Ms. Futnell, that Sta-Lube's products need only be registered as a fuel additive. 9/

Sta-Lube argues that Alley was also reasonable in relying on what he understood he was told by Ms. Futnell because he observed that other similar products on the market also had no FIFRA registration numbers on their labels. The facts in this case show that Alley's own investigation into whether the product should be registered under FIFRA, far from having been done with care, was done, instead, in a most slipshod manner. His conduct is not made more reasonable by the fact that other companies may not have exercised any more care than he did, or may simply have chosen to ignore the law's requirements. 10/

8/ Respondent's Exh. 7; Tr. 77, 89, 100.

9/ Tr. 17, 91.

10/ It is to be noted that the EPA has since issued consent orders against the manufacturers of these other products. Complainants Exhs. 7, 9, 10, 11.

Sta-Lube also contends that no penalty should be assessed because there was little risk of harm to man or the environment in using small quantities of BIOBOR in a fuel which is consumed in the engine. 11/ The penalty schedules in the guidelines with respect to non-registration of a pesticide and a pesticide producing establishment unlike the schedules for other violations are not based on probable injury of the conduct to man or environment. Instead, the size of the penalty is determined by whether the violator knew or did not know of the registration requirements. 12/ It is understandable why registration violations are so treated, given the importance of the registration requirements to effective enforcement of the Act. It is through registration of pesticides that the EPA not only keeps products harmful to man and the environment off the market but also ensures that the products are properly labelled. 13/ There is no claim here that Sta-Lube's product was properly labelled, and, indeed, the indication is that it was not. 14/ In any event, the Act vests in the EPA and not the marketer of the product the determination as to whether a product should be registered and under what conditions. To excuse Sta-Lube's failure to register its product because it regarded the product's

11/ Brief at 22-25.

12/ See 39 Fed. Reg. 27713, 27717. The proposed penalty of \$4,000, is based on Sta-Lube not having knowledge of the registration requirements. A larger penalty is provided for violations done with knowledge of the requirements. Complainant's argument that the facts demonstrate that Sta-Lube had sufficient knowledge of the regulatory requirements to charge Sta-Lube with knowledge is rejected.

13/ See 40 C.F.R. 162.2(d).

14/ Compare the label for Sta-Lube's product in Complainant's Exh. 3, with the BIOBOR label in Respondent's Exh. 6.

pesticidal function as unimportant compared to its other purposes, and the product itself as safe, would be to encourage non-compliance with the registration requirements by a party in the hope that it can escape a penalty by minimizing the risk of harm caused by its violation if and when it is finally caught.

Registration of pesticide producing establishments assists the Administrator in tracking down violations of the Act and accidental discharges or spillage. 15/ The usefulness of registration as an aid to enforcement would also be undermined if a party could escape sanctions for not registering its establishment again in the hope that if caught it can prove that its product presented no significant harm.

For the reasons above stated, it is concluded that \$4,000, is the appropriate penalty for the violations found herein. 16/ It is true that Sta-Lube has moved to correct the violations. The claim, however, that this should mitigate the penalty is rejected in view of Sta-Lube's failure to show it did act as a reasonably prudent person would be expected to act under the circumstances.

15/ See S. Rep. No. 92-838, 92d Cong., 2d Sess. 6 (1972).

16/ Although Sta-Lube argues that \$4,000 is a substantial penalty for a company of Sta-Lube's size, it does not really contend that payment will adversely affect its ability to continue in business.

FINAL ORDER 17/

Pursuant to the Federal Insecticide, Fungicide and Rodenticide Act, section 14(a)(1), 7 U.S.C. 136 1(a)(1), a civil penalty of \$4,000 is assessed against Respondent Sta-Lube, Incorporated, for violation of the Act found herein.

Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America.



Gerald Harwood
Administrative Law Judge

DATED: Apr 11, 1985

17/ 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).