

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Andrew J. Allen d/b/a) Docket No. IF&R-04-94F044-C
Allen Chemical Company,)
)
Respondent)

INITIAL DECISION

By: Carl C. Charneski
Administrative Law Judge

Issued: July 31, 1996

Appearances

For Complainant: Lynda Crum, Esq.
Alan E. Dion, Esq.
U.S. Environmental Protection Agency
345 Courtland Street, N.E.
Atlanta, GA 30365

For Respondent: Andrew J. Allen
Allen Chemical Company
4308 Wilderness Road
Birmingham, AL 35210

I. Background

The United States Environmental Protection Agency ("EPA") filed a complaint against Andrew J. Allen d/b/a Allen Chemical Company ("Allen Chemical") alleging three violations of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136 *et seq.* Thereafter, EPA filed a motion for accelerated decision on the issue of liability. 40 C.F.R. § 22.20. In an order dated February 7, 1996, EPA's motion was granted and Allen Chemical was found to have violated FIFRA as alleged in all three counts. An evidentiary hearing was then held on February 21, 1996, in Birmingham, Alabama, to determine the civil penalty to be assessed against Allen Chemical for the violations. This decision addresses the civil penalty issue.

II. The Violations

Allen Chemical committed three violations of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), in its sale of "Allen Root Control", an unregistered pesticide.¹ Section 12(a)(1)(A) provides that it is unlawful for any person to distribute or sell any pesticide that is not registered under Section 3(a) of FIFRA. 7 U.S.C. § 136a(a).

Count I involves Allen Chemical's sale of Allen Root Control to the Water and Wastewater Department, City of Avon Park, Florida, on March 24, 1993. Count II involves the sale of this product to the City of Piedmont, Water, Gas, and Sewer Board, Piedmont, Alabama, on May 28, 1993. Count III involves the sale of Allen Root Control to the Sylacauga Housing Authority, Sylacauga, Alabama, on June 1, 1993. As previously held, each of these sales constituted a violation of Section 12(a)(1)(A) of FIFRA and is the subject of the present penalty action.

III. Determination Of The Civil Penalty

Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), provides for the assessment of a civil penalty of up to \$5,000 for the distribution or sale of a pesticide that is not registered pursuant to Section 3(a). EPA initially sought a \$4,000 penalty for each of the violations set forth in Counts I, II, and III. Complainant has subsequently reduced to \$3,000 the amount of penalty sought for each violation.² Accordingly, EPA now seeks civil penalties against Allen Chemical totaling \$9,000. Compl. Br. at 3.

Section 14(a)(4), 7 U.S.C. § 136l(a)(4), sets forth the factors that are to be considered by this court in determining the appropriate penalty for a Section 12(a)(1)(A) violation. Those factors are "the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation."

¹ Allen Root Control is designed to remove roots and other types of vegetation obstructing sewer lines. Tr. 97. The label on Allen Root Control in part states: "Root Control provides a simple and inexpensive means of removing from sewers the roots of trees and shrubs which have penetrated the joints of underground conduits in their search for food and water." See February 7, 1996, order granting partial accelerated decision, at 2.

² EPA based its proposed penalty reduction upon the fact that Allen Chemical was a small-sized business, and not medium-sized as initially believed. In that regard, referring to Dun and Bradstreet reports admitted into evidence as Complainant's Exhibits 3, 4, and 5, EPA acknowledges that Allen Chemical employed less than five people. Thus, it is considered a small business pursuant to EPA's "Interim Policy on Compliance Incentives for Small Businesses." See Compl. Br. at 10-11.

In determining the penalty amount to seek in this case, complainant EPA followed the guidelines contained in its "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act" (the "ERP"). Compl. Ex. 2. The results of EPA's application of these ERP guidelines are set forth in the Agency's FIFRA Civil Penalty Calculation Worksheet. Compl. Ex. 1.

Applying the ERP guidelines, EPA determined that each of the three violations involved in this case warranted a base penalty of \$3,000. EPA reached that determination upon concluding that each of the three counts involved what it termed a level 2 violation, and the fact that Allen Chemical was a small business. See Compl. Br. at 12-13. After calculating a \$3,000 base penalty, EPA continued its penalty assessment process by next determining whether, under the particular facts of this case, an upward or downward adjustment of the penalty was warranted. In making that determination, EPA considered the toxicity of Allen Root Control, the pesticide's harm to human health, its environmental harm, Allen Chemical's compliance history, as well as the respondent's culpability for the violations. On the basis of these considerations, EPA concluded that no adjustment to the \$3,000 per violation penalty was warranted. See Compl. Br. at 14-17.

Upon measuring the facts of this case against the statutory penalty criteria of FIFRA Section 14(a)(4), this court finds that EPA's proposed civil penalty is excessive. Given the information provided by complainant in its Enforcement Response Policy calculation and considering the applicable FIFRA statutory penalty criteria, a \$1,000 civil penalty for each of the three violations is the appropriate sanction.

In that regard, inasmuch as EPA concedes that Allen Chemical is a small business, the civil penalty determination in this case primarily turns on "the effect on the person's ability to continue in business" and "the gravity of the violation" Section 14(a)(4) statutory criteria.

A. Allen Chemical's Ability To Continue In Business

In the initial stages of a proceeding, a respondent's ability to pay a penalty, i.e., its ability to continue in business, may be presumed. If, however, the respondent places the ability to pay in issue, the EPA "must show as part of its prima facie case that it considered the appropriateness of the proposed penalty in light of the penalty's effect on respondent's ability to continue in business." In re James C. Lin and Lin Cubing, Inc., FIFRA Appeal No. 94-2 (EAB, Dec. 6, 1994), Vol. 5 Environ. Admin. Dec. at 599, citing In re New Waterbury, Ltd., TSCA Appeal No. 93-2 (EAB, Oct. 20, 1994), Vol. 5 Environ. Admin. Dec. at 529.

At the hearing in this case, Andrew J. Allen, the owner of Allen Chemical Company, testified that his company is no longer in business. Mr. Allen stated: "... I have no business anymore. I closed it up three weeks ago because of not being able to make a living at it anymore and because of my ability to work. My physical and mental condition has put me in

a condition that I cannot exert the energy required to be productive.” Tr. 99-100. Mr. Allen’s testimony is sufficient to put in issue his ability to pay a civil penalty in this matter.³

EPA takes issue with Mr. Allen’s testimony. First, it submits that respondent has provided “absolutely no documentation” to support the assertion that the company has closed its doors. Compl. Br. at 22-24. Second, EPA cites to the Dun & Bradstreet business information reports which comprise Complainant’s Exhibits 3, 4, and 5 as showing that Allen Chemical had projected annual sales of \$350,000 in 1994. There is, however, no annual sales information for the years 1995 and 1996. *Ibid.*⁴

Admittedly, there is not a great deal of evidence in the record regarding Allen Chemical’s ability to pay a civil penalty. On the one hand, respondent has failed to show that it is no longer in business and is unable to pay any penalty. On the other hand, while complainant EPA has shown that Allen Chemical is able to pay a penalty, it has failed to show that the proposed \$9,000 penalty is the appropriate amount. The answer as to the appropriate penalty amount lies somewhere in between. That answer rests in large measure upon consideration of the gravity of the violation criteria of FIFRA Section 14(a)(4), discussed below.

B. The Gravity Of The Violation

Robert Stryker, a senior life scientist in EPA’s pesticide section, testified on behalf of the complainant as to the gravity of the involved FIFRA violations.⁵ Referring to the

³ Although the ability to pay issue was raised for the first time at the hearing, inasmuch as respondent is appearing *pro se* and no objection has been made by EPA as to timeliness, this issue is properly before the court.

⁴ Sometime after the hearing in this case, however, Allen Chemical submitted to EPA the 1995 personal income tax return of Andrew J. Allen and Betty A. Allen. Apparently this was an effort by respondent to show an inability to pay the proposed penalty and thus obtain from EPA a more favorable penalty calculation under the Enforcement Response Policy procedure. See Tr. 100-102. The parties are in substantial disagreement as to what this post-hearing financial information means. For example, part of this disagreement involves the numbers and types of automobiles owned by Mr. Allen, as well as whether the respondent owns or rents his home. Because this document was not admitted into evidence, nor was it even provided to the court as part of the parties’ post-hearing submissions, the parties’ arguments as to what it contains are not being considered in the resolution of this case.

⁵ Mr. Stryker is an EPA regional expert on pesticides for inspector training and case development. Tr. 13. He performed the penalty calculations in this case appearing in Complainant’s Exhibit 1, the FIFRA Penalty Calculation Worksheet. Tr. 26.

provisions contained in 40 C.F.R. Part 160, Mr. Stryker stated that there is a large amount of data that must be obtained before a pesticide can be registered with EPA. Tr. 16-17.⁶ Stryker stated further that the Part 160 data includes consideration as to the effect of the pesticide's toxicity factors upon human health and the environment. *Ibid.*

With respect to the pesticide at issue here, Allen Root Control, the active ingredient identified was copper sulfate. Tr. 53-54. Copper sulfate is employed for the most part as a fungicide in a number of primarily aquatic uses. Tr. 57. According to EPA's expert witness, Stryker, copper sulfate has an LD₅₀ "up around four hundred milligrams per kilogram." In other words, this chemical has "a lethal dose concentration to a test animal of fifty percent death of fifty milligrams per kilogram." Tr. 54. Stryker added that because copper sulfate has an LD₅₀, it qualifies as a Category II product under the toxicity table contained in 40 C.F.R. § 156.10. Tr. 51-54. While Toxicity Category I is the most hazardous category, Toxicity Category II products are required to bear on the front panel, the signal word "Warning". 40 C.F.R. § 156.10(i)(B).

Stryker was unable to provide more specific testimony as to the hazards posed by copper sulfate in this case as EPA did not have a statement listing the percentage of active ingredients in Allen Root Control. Tr. 55-58.⁷ Nonetheless, his testimony is sufficient to establish that this Toxicity Category II chemical does indeed pose a potential threat to human health and to the environment.

In its defense, Allen Chemical argues that sulfuric acid and caustic soda are sold on the market for removing roots and that neither one is required to be registered pursuant to Section 3(a) of FIFRA. Tr. 95-98. Whether Allen Chemical is raising this argument as a defense to the alleged violations, or as a reason for lowering the proposed penalty, it is beside the point. First, it already has been held that Allen Chemical violated FIFRA by failing to register the product, Allen Root Control. Second, it has been established that copper sulfate is an active ingredient in Allen Root Control and that copper sulfate is a Toxicity Category II chemical which presents certain health and environmental dangers. Moreover, there is very little evidence in this case regarding the ingredients and uses of sulfuric acid and caustic soda,

⁶ 40 C.F.R. Part 160 is titled, "Good Laboratory Practice Standards". Section 160.1(a) explains its scope: "This part prescribes good laboratory practices for conducting studies that support or are intended to support applications for research or marketing permits for pesticide products regulated by the EPA. This part is intended to assure the quality and integrity of data submitted pursuant to sections 3, 4, 5, 8, 18 and 24(c) of [FIFRA]."

⁷ Stryker based his testimony regarding the potential human and environmental harm posed by copper sulfate upon information obtained from the Pest Bank and the Farm Chemical Handbook. Tr. 57.

and Allen Chemical simply has not shown that the make-up and uses of those products has a bearing on this case.

In addition, Allen Chemical argues that it did not register Allen Root Control as required by FIFRA because it had not been notified by the product's manufacturer that it had to do so. In that regard, Mr. Allen testified that since 1972 he has registered between 40 to 50 products with EPA. He added that the factory that makes these products informs him when the products must be registered and that all he does is to fill out a sub-registration form. In fact, Mr. Allen stated that EPA registration helps to sell a product because of consumer interest in its being so registered. Tr. 89-90, 92.

EPA disputes this contention arguing that given the respondent's experience in the chemical industry, and given the fact that it had previously registered 40 to 50 products with EPA, that it certainly should have known that a product containing copper sulfate likewise had to be registered under FIFRA. Compl. Br. at 17; Tr. 60-62. EPA is correct. Nonetheless, the respondent's negligence in failing to register Allen Root Control is reduced by the fact that it had in the past relied upon the manufacturer's determination as to when a product had to be registered with EPA and apparently had done so here, as well as the fact that Allen Chemical had never previously been cited for violating FIFRA.

IV: Conclusion

The facts of this case establish that a \$1,000 civil penalty is the appropriate sanction for each of the three FIFRA violations. This penalty assessment takes into account the size of Allen Chemical, its ability to pay, and, in particular, the gravity of the violations. While EPA established that a civil penalty was warranted in this case, it failed to provide sufficient facts to substantiate the \$3,000 per violation penalty proposal calculated pursuant to its FIFRA Enforcement Response Policy.

ORDER

Accordingly, Andrew J. Allen d/b/a/ Allen Chemical Company is ordered to pay a civil penalty totaling \$3,000 pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. § 136l(a)(1), for its three violations of Section 12(a)(1)(A), 7 U.S.C. § 136j(a)(1)(A). Payment of the penalty shall be made within 60 days of the date of this order by mailing or, presenting a cashier's or certified check made payable to the Treasurer of the United States, to the Regional Hearing Clerk, U.S. EPA, Region 4, P.O. Box 100142, Atlanta, Georgia, 30384.⁸

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

⁸ Unless this decision is appealed to the Environmental Appeals Board ("EAB") in accordance with 40 C.F.R. § 22.30, or unless the EAB elects to review this decision *sua sponte*, it will become the final order of the EAB. 40 C.F.R. § 22.27(c).