6/10/76

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of	)	
	)	
CLOROBEN CHEMICAL CORPORATION	)	I.F. & R. Docket No. II-87C
	)	
Respondent	)	

INITIAL DECISION

Preliminary Statement

This is a proceeding under Sec. 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [7 U.S.C. 136 l(a)], 1973 Supp., for the assessment of a civil penalty for violation of the Act.

On July 14, 1975, the Director of the Environmental Programs Division, United States Environmental Protection Agency, Region II ("complainant") issued a Complaint and Notice of Opportunity for Hearing, charging the Cloroben Chemical Corporation ("respondent") with violations of the Act. An extension of time to September 15, 1975 was granted for the filing of an answer and said answer was duly filed by letter dated September 11, 1975.

On November 6, 1975 complainant's Amended Complaint and Notice of Opportunity for Hearing was served upon respondent, pursuant to 40 CFR §168.31(c) and consistent with my Order of

October 23, 1975 granting leave to file said Amended Complaint. The original Complaint was amended by withdrawing one of the two charges contained therein and adding two additional charges.

The Amended Complaint charged respondent with violation of Sec. 12(a)(1)(E) [7 U.S.C. §136j(a)(1)(E)] by holding for sale a pesticide called Blue Seal Root Raider on or about January 8, 1975 in Kearney, New Jersey, which pesticide was not in compliance with the provisions of FIFRA in that:

1. Said pesticide was misbranded in that the label borne by the product failed to bear an ingredient statement giving the name and percentage of each of the active ingredients, together with the total percentage of the inert ingredients. (FIFRA, as amended, Section 12(a)(1)(E); Section 2(q)(2)(A).) Specifically, said product did not bear any ingredient statement.

2. Said pesticide was misbranded in that the label did not bear on the front panel or the part of the label displayed under customary conditions of purchase the warning statement "Keep out of reach of children," and the appropriate signal work ("Danger"). (FIFRA, as amended, Section 12(a)(1)(E); Section 2(q)(1)(G).) Specifically, the statement "Keep out of reach of children" appeared on a side panel of the product's label, and the signal word "Danger" did not appear at all.

3. Said pesticide was misbranded in that the precautionary labeling was not so placed as to render it conspicuous and likely to be read under customary conditions of purchase. (FIFRA, as amended, Section 12(a)(1)(E); Section 2(q)(1)(E).) Specifically, the label of said product did not bear the precautionary word "poison" on the front panel as required in connection with the product's approved registration, and by applicable regulations. (40 CFR 162.9(b).)

4. Said pesticide was misbranded in that the label borne by the product failed to bear the product's assigned registration number. (FIFRA, as amended, Section 12(a)(1)(E); Section 2(q)(2)(C)(v).)

Although Complainant asserts that the Agency's Civil Penalty Assessment Schedule (39 F.R. 27713) would have permitted assessment under Sec. 14(a) of FIFRA 1972 of a total of $11,800.00 for the four violations charged in the Amended Complaint,[1/] an assessment of $5,000.00 for the four violations has been proposed as follows:

Charge 1 (No ingredient statement): $3,000.

Charge 2 (Legend "Keep out of reach of children" not on front panel/Failure of label to bear signal word "Danger"): $1,500.

Charge 3 (Precautionary word "Poison" not on front of label): $500.

Charge 4 (Failure of label to bear registration number): No monetary penalty.

1/ Charge Code E5 (toxicity level: Danger): $5,000.
Charge Code E2 (toxicity level: Danger): $2,800.
Charge Code E14 (toxicity level: Danger): $2,800.
Charge Code E9 (violation appearing in combination with more than two additional charges): $1,200.
[Civil Penalty Assessment Schedule, 39 F.R. 27713 (July 31, 1974).]

It should be noted that neither the ALJ nor the Regional Administrator is bound by the amount of proposed penalty in the Complaint. See 40 CFR 168.46(b) and 168.60 (b)(3).

The Respondent, through counsel, filed an Answer which admits that all technical violations alleged did exist. See also TR. pp. 5 and 10. And further, the parties stipulated, EPAX 1, to all other facts relevant to this proceeding, such as the official visit by the Consumer Safety Inspector, the obtaining of the samples, the label in question, Res. Exh. 1, and to the fact that the product was properly registered with EPA under No. 5819-2.

The question then to be decided here relates solely to the assessment of a civil penalty.

Respondent does assert in its Answer that there are mitigating circumstances as follows:

1. Respondent did not prepare the label in question, but acquired it as the result of the purchase of all property of the Blue Seal Chemical Co. approximately eight years ago and continued to use it.

2. Only 32 50-lb. drums of the product were sold during the most recent fiscal year with a sale value of approximately $650.00.

3. The product was immediately withdrawn from sale and the remaining stock in 50-lb. drums was emptied from its containers upon notification of label deficiency.

4. The purchase and use of the product is limited to professionals only (plumbing wholesalers) as is stated on the label.

5. The product was not available for retail purchase by the general public and, in fact, the directions for use are appropriate for a journeyman or master plumber.

6. While the information required on the label is in technical violation of the Act, Respondent asserts it does set forth sufficient information to accomplish the Act's purpose; including ingredients, cautionary warnings, skull and crossbones and directions for use.

7. Even though the required information is not set forth on the front panel, the drum being 12" in diameter affords the purchaser or user a full view of the entire label.

The proceedings were conducted pursuant to the applicable Rules of Practice, 40 CFR 168.01 et seq. At my request, the parties, pursuant to Sec. 168.36(e) of the Rules, corresponded with me for the purpose of accomplishing some of the purposes of a prehearing conference (see Sec. 168.36(a) of the Rules).

A prehearing conference and a hearing were held in New York City on February 18, 1976. The Complainant was represented by Steven A. Dvorkin, Esq., of the legal staff of EPA, Region II, and the Respondent was represented by Bernard Furman, Esq.

The parties have filed briefs and reply briefs in support of proposed findings of facts, conclusions of law and order which I have carefully considered.

Fingings of Fact

1. The Respondent is a corporation with its place of business located at 1035 Belleville Turnpike, Kearney, New Jersey. Its gross sales are approximately $1,800,000 annually.

2. On or about January 8, 1975, the Respondent held for sale a quantity of pesticide called Blue Seal Root Raider at its establishment in Kearney, New Jersey.

3. A sample of the product (No. 117835) was collected in accordance with legal procedures by an employee of the Environmental Protection Agency on January 8, 1975.

4. The product was labeled in part "For sewers blocked or partially blocked with tree roots or other organic matter." The product is a "pesticide" within the meaning of Sec. 2(u) [7 U.S.C. 136(u)], and is a "plant regulator" within the meaning of Sec. 2(v) [7 U.S.C. 136(v)] of the Federal Insecticide, Fungicide, and Rodenticide Act.

5. The product was registered as required by Sec. 4 of the FIFRA, 7 U.S.C. 136(b), at the time it was held for sale.

6. The product's label did not contain an ingredient statement as required by Sec. 2(q)(2)(A).

7. The statement "Keep out of reach of children" appeared on the side panel of the product's label and not on the front panel as required by Sec. 2(q)(1)(G).

8. The signal word "Danger" did not appear on the label as required by Sec. 2(q)(1)(G).

9. The label did not bear the precautionary word "Poison" on the front panel as required in connection with the products registration. 40 CFR 162.9(b).

10. The label did not bear the product's assigned registration number as required by Sec. 2(q)(2)(C).

11. For the above mentioned violations, the Respondent is subject to a civil penalty under Sec. 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 l(a).

12. Taking into consideration the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violation, it is determined that a penalty of $1,000 is appropriate.

Discussion and Conclusions

Since the allegations and facts in this matter are undisputed, the case is reduced to a determination as to the amount of the civil penalty to be assessed.

In determining the appropriateness of the penalty the statute and regulations require that the following factors be considered: Size of Respondent's business; effect on Respondent's ability to continue in business; and gravity of the violation. In evaluating the gravity of the violation the regulations require that the following be considered: history of Respondent's compliance with the Act; and good faith or lack thereof.

The Respondent's gross sales in 1974 were approximately $1,800,000. As to size of company, it falls into category V (annual gross sales exceeding a million dollars) as set forth in the Guidelines for the Assessment of Civil Penalties under FIFRA. (39 F.R. 27711, July 31, 1974).

The Respondent does not argue that its annual gross sales are not substantial (one million dollars or more) or that the imposition of a penalty in the proposed amount will effect its ability to continue in business. The Respondent argues, however, that the violation was minor and that no penalty should be imposed.

It has been held in other cases under Sec. 14(a) that "gravity of the violation" should be considered from two aspects--gravity of harm and gravity of misconduct.

> As to gravity of harm there should be considered the actual or potential harm or damage, including severity, that resulted or could result from the particular violation. . . .
>
> As to gravity of misconduct, matters which may be properly considered include such elements as intention and attitude of respondent; knowledge of statutory and regulatory requirements; whether there was negligence and if so the degree thereof; position and degree of responsibility of those who performed the offending acts; mitigation and aggravating circumstances; history of compliance with the Act; and good faith or lack thereof.2/

Respondent alleges that the marketing of the product with the deficient label affixed thereto was not a deliberate or intentional violation. That it was an oversight for which there is no explanation. TR. p. 48.

Approximately eight years ago Respondent purchased the assets of Blue Seal Chemical Company including their stock of labels to be used on the 50-lb. drums of Blue Seal Root Raider. Since sales of this product in this size container are so small, the need had not arisen to reorder a supply of these labels and hence, change the name appearing thereon from Blue Seal Chemical

2/ Quoted from Initial Decision of ALJ In re Amvac Chemical Corporation, published in Notices of Judgment under FIFRA No. 1499, issue of June, 1975.

Company to the name of the Respondent and to also review any other deficiencies which might have been apparent upon such a review. Having used these labels for six years without incident Respondent erroneously assumed all was in order.3/

As a mitigating circumstance and to show good faith the Respondent urges that immediately upon being notified that the label used was in violation of the Act, sales of the product were discontinued, all inventory of the product in 50-lb. drums was emptied from its containers to avoid accidental sale thereof and a new label was submitted to EPA for approval. Such action, while commendable, is not a mitigating factor since it was in the interest of Respondent and served its purpose of avoiding further prosecution.

As to gravity of harm there should be considered the actual or potential harm or damage, including severity, that resulted or could result from the particular violation.

Dr. Sandifer, one of two physicians who testified on behalf of Complainant, testified that severe harm and even death could result from a misuse of the product, the ingredient being 94% sodium hydroxide (lye). This fact was not disputed and, in fact, was agreed to by Respondent.

3/ When the 5- and 20-pound supply of lithographed cans for the product was exhausted, Respondent submitted the labels with the name change to EPA for approval.

Thus, it is apparent that there is potential harm from the misuse of the product.

One of the purposes of registration is to prevent the marketing of pesticides that have the potential of causing harm or injury and proof of actual harm or injury is not necessary in considering gravity of harm.

Neither of the two doctors testified as to any actual knowledge of injury due to misuse of the product here in question.

As to gravity of misconduct one of the factors to be considered is whether Respondent had knowledge of the requirements of the Act. The Respondent has acknowledged that it was aware of all registration requirements of the Act. TR. p. 62.

The Respondent may not have had any intention to violate the requirements of the statute in this instance, but intent to violate is not an element of the offense in a civil penalty proceeding. Cf. United States v. Dotterweich, 320 U.S. 277 (1943); United States v. Balint, 258 U.S. 250 (1922).

Other alleged mitigating factors relating to degree of misconduct, such as the fact that Respondent did not prepare the label, only 32 drums with a value of $650.00 were sold and

that some cautionary information is set forth on the label even though not properly placed do not, in my opinion, serve to mitigate the violations charged.

Certain other factors do, however, in my opinion, serve to mitigate the degree of misconduct. The Respondent has not in the past been the subject of even a warning notice from EPA or its predecessor and the product was not available for retail purchase by the general public and was sold only to plumbing wholesalers with directions for use directed to journeymen or master plumbers.

While the visibility of the entire contents of the label when placed on the 50-lb. drum measuring 12 inches in diameter is quite good, the regulations require the cautionary information and ingredient statement to be placed on the front panel. These are technical requirements which are, in my opinion, founded on solid reasoning.

While Respondent urges that the violations were not intentional, but mere oversight, I find that since it knew of the requirements of the Act its failure to review and revise the label in question constitutes negligence.

I have taken into account all of the factors that are required to be considered in determining the appropriateness of the penalty. I am of the view that the proposed penalty of $5,000.00 is inappropriate and should be reduced to $1,000.

The proposed Findings of Fact and Conclusions submitted by the parties have been considered. To the extent that they are consistent with Findings of Fact, and Discussion and Conclusions herein, they are granted, otherwise they are denied.

Having considered the entire record and based on the Findings of Fact, and Discussion and Conclusions herein, it is proposed that the following order be issued.

Final Order

Pursuant to Sec. 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 l(a)(1)), a civil penalty of $1,000.00 is assessed against Respondent, Cloroben Chemical Corporation for the violation which has been established on the basis of the amended complaint issued on November 6, 1975.

Edward B. Finch
Administrative Law Judge

June 10, 1976

Unless appeal is taken by the filing of exceptions pursuant to Sec. 168.51 of the Rules of Practice or the Regional Administrator elects to review this decision on his own motion, the order shall become the final order of the Regional Administrator. (See Sec. 168.46(c).)