

9/20/80

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY .

In the Matter of	)	
Wilbert Products Co., Inc.,	)	I.F. & R. Docket No. II-210-C
Respondent	)	

Randy Stein, Esq., General Enforcement Branch,  
United States Environmental Protection Agency,  
Region II, 26 Federal Plaza, New York, New  
York, for the Complainant.

A. W. DeBirney, Esq., Friendship, Maryland,  
for the Respondent.

(Decided September 20, 1980)

Before: J. F. Greene, Administrative Law Judge

INITIAL DECISION AND ORDER

This matter arises under 7 U.S.C. Sec. 136, et seq., the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (hereafter "the Act"), and regulations issued pursuant to authority contained therein, 40 C.F.R. Sec. 168.01 et seq. In this civil action, the Environmental Protection Agency, the complainant herein, seeks assessment of civil penalties against the respondent pursuant to 7 U.S.C. 136 1(a), Sec. 14(a) of the Act, for certain alleged violations of the Act.

The amended complaint alleges that on or about October 25, 1977, the respondent Wilbert Products Co., Inc., shipped from its place of business in Bronx, New York to Edison, New Jersey, its product Wilbert Fresh Pine Scent, a pesticide within the meaning of 7 U.S.C. Sec. 136(u), which was "misbranded", as that term is defined at 7 U.S.C. Sec. (q)(2)(A), in violation of Section 12 (a)(1)(E) of the Act, 7 U.S.C. Sec. 136j(a)(1)(E). The complaint alleges further that the product was "adulterated", 7 U.S.C. 136(c)(1), in that it actually contained 1.5% Ortho benzyl para chloro phenol (the active ingredient) rather than 2%, the strength set forth on the label, in violation of Section 12(a)(1)(E) of the Act, 7 U.S.C. 136j(a)(1)(E). A total civil penalty of \$1800.00 is urged by the complainant.

The respondent admits all jurisdictional facts, admits that the stated strength of the active ingredient on the product label exceeded the actual strength of the ingredient as it was found in the product, and agrees that the product was in fact "adulterated" and "misbranded" as those terms are defined by the Act. The respondent vigorously denies, however, that the penalty sought by the complainant is appropriate, and, moreover, argues that the matter should be dismissed owing to the absence of any justification for the imposition of a penalty in any amount. The principal question presented for decision, therefore, is the appropriateness of the penalty sought by the government. 1/

In considering the appropriateness of any such penalty, it is noted that regulations issued by the Environmental Protection Agency pursuant to the Act provide for consideration of the gravity of the violation, the size of the respondent's business, and the effect of payment of the penalty as proposed on the respondent's ability to continue in business. In connection with the gravity of the violation, numerous factors may be taken into account, including the scale and type of use or anticipated use of the product, and evidence of good faith, or lack thereof, in the circumstances; the potential that the alleged acts have to injure persons or the environment; and the severity of such potential injury. In addition, the extent to which the applicable provisions of the Act were in fact violated may be considered. 39 Federal Register July 31, 1974, pp. 27712, 27718.

On this record, it cannot reasonably be argued that the penalty proposed by the government is sufficiently great to affect the respondent's ability to continue in business. The ability to pay, however, is only one dimension of an inquiry into the appropriateness of the penalty urged.

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1/ For the alleged violation of Section 12(a)(1)(E), 7 U.S.C. 136j(a)(1)(E), (misbranded pesticide), no penalty is sought. For the adulteration violation, charged under the same section, \$1800.00 is sought.

As to whether the violations established here are sufficiently grave to warrant an \$1800.00 penalty, account must be taken of several factors: there is no evidence as to how long the deficiency in the active ingredient may have continued -- whether it was brief or prolonged; and no evidence has been offered to suggest whether, or to what extent, the product is rendered ineffective for its stated purposes by a reduction of 11% in the active ingredient. 2/ Further, the product is represented principally as a household cleaner, disinfectant, and deodorizer, according to the label. 3/ There is no evidence as to the scale of use, either by means of dollar or unit volume of sales of the product, customer lists, or other means; and the potential for injury to man and the environment is, on this record, non-existent -- not merely "not probable," which is one of the tests used in determining the amount to be proposed when the Complaint is drawn. 4/

On the other hand, in July, 1974, the respondent consented to an agreement and final order which imposed a penalty of \$1300.00 for failure of the same product to contain any amount of the represented 2% Ortho benzyl para-chlorophenol (Complainant's exhibit 5).

Considering all of the above factors, and further taking into account what appears to have been an effort on the part of the respondent to cooperate with the complainant in certain ways, it is determined that the amount of \$500.00 is an appropriate civil penalty. It is emphasized, however, that any future violation of this type would have to be viewed much more seriously, since it would inevitably suggest a lack of good faith on the part of the respondent.

#### FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. The respondent Wilbert Products Co., Inc., is a corporation organized, existing, and doing business under the laws of the State of New York, having its principal place of business at 805 East 139th Street, Bronx, New York, with gross sales in excess of \$1,000,000 for each of the calendar years 1977, 1978, and 1979, and at all relevant times herein the respondent has been engaged in the sale and distribution of various products, including Wilbert Fresh Pine Scent, a "pesticide" within the meaning of 7 U.S.C. 136(u)(1). 5/ The respondent corporation is subject to the jurisdiction of the Act.

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2/ Although the Complaint states that the percentage of the active Ingredient was 1.5%, it was later stipulated that the level was in fact 1.58% (TR, p. 5). Accordingly, 1.58% strength is equal to 79% of the advertised level (2%).

3/ Suggested are kitchen, laundry, and bathroom uses, and the product is said to be an effective deodorant when sprayed on grabage, TR p. 79. There is virtually no suggestion that the product is suitable for industrial use anything other than household purposes.

4/ TR at p. 28.

5/ EPA registration number 4082-1.

2. On or about October 25, 1977, the respondent shipped its product Wilbert Fresh Pine Scent, bearing a label which represented that the product contained 2% Ortho benzyl para chlorophenol, from Bronx, New York, to Edison, New Jersey. In fact, however, the product so shipped contained about 1.58% Ortho benzyl para chlorophenol, i.e. less than the amount represented on the label. 6/

3. A pesticide is "misbranded" if its labeling bears any statement relative to its ingredients which is false or misleading in any particular, 7 U.S.C. 136(q)(1)(A), and is "adulterated" if its strength or purity falls below the "professed standard of quality as expressed on its labeling under which it is sold," 7 U.S.C. 136 (c)(1).

4. The failure of the label to state correctly the strength of the ingredient Ortho benzyl para chlorophenol constitutes both "misbranding" and "adulteration," as those terms are defined in the act.

5. The respondent did in fact violate Sec. 12(a)(1)(E) of the Act, 7 U.S.C. j(a)(1)(E), by failing to state accurately on the label of its product Wilbert Fresh Pine Scent the strength of the ingredient Ortho benzyl para chlorophenol.

6. Since the respondent is a "registrant," 7 U.S.C. 136(y), and distributor, and has violated a provision of the Act, a civil penalty may be assessed against the respondent.

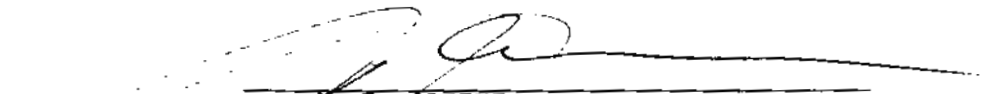
7. Under the circumstances set forth in this record, the amount of \$500.00 constitutes an appropriate civil penalty to be assessed for the violations established.

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6/ It will be noted that a copy of the label, offered by the complainant as its Exhibit 1 (see TR pp.6-7) is attached to the transcript at p. 79, between two respondent's exhibits.

FINAL ORDER

Accordingly, it is ORDERED, pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 1361(a)(1), and upon consideration of the entire record herein, after evaluating the gravity of the violations and the appropriateness of the penalty proposed, that the respondent Wilbert Products Co., Inc., pay, within sixty (60) days of service upon it of the final order, the amount of \$500.00 as a civil penalty for violations of the said Act by forwarding to the Regional Hearing Clerk a cashier's check or a certified check for the said amount payable to the Treasurer, United States of America, 40 C.F.R. Sec. 22.31(b).

  
J. F. GREENE  
Administrative Law Judge

September 20, 1980  
Washington, D.C.

Note: This Final Order shall become the final order of the Regional Administrator unless appealed or reviewed as provided by 40 C.F.R. Sec. 168.51 of the Rules of Practice.