

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY



IN THE MATTER OF:)

SUNSET POOLS OF ST. LOUIS, INC.)

Docket No. I.F.&R. VII-355C

Marvin E. Jones
Administrative Law Judge
324 East 11th Street
Kansas City, Missouri 64106

INITIAL DECISION

By complaint filed January 11, 1980, the U. S. Environmental Protection Agency (Complainant) charged Sunset Pools of St. Louis, Inc. (AKA Aqua Tech Pool Service)(hereinafter Respondent) with violation of Section 12^{1/} of the Federal Insecticide, Fungicide and Rodenticide Act, as Amended (hereinafter the "Act") in that Sample Number 181134 of Respondent's product -- Aqua Chlor Concentrate -- was held for sale and sold at Respondent's establishment in St. Louis, Missouri, when said product was not registered under Section 3 in violation of and as required by Section 12(a)(1)(A). It is further alleged that Respondent's product is a "pesticide" within the meaning of the Act and as that term is defined in Section 2(u). (See also Section 2(t), definition of "pest").

Said Complaint further states that a proposed penalty of \$1,540.00 was determined in accordance with applicable Guidelines (39 FR 27711; 27713 et seq.).

Respondent, on January 28, 1980, requested a hearing on the allegations contained in said Complaint.

An Adjudicatory Hearing was convened in Court Room 829, U. S. Court and Customs House, 1114 Market Street in St. Louis, Missouri, on Thursday, August 14, 1980, beginning at 11:00 a.m., at which time W. W. Sleater, Esquire, entered his appearance as attorney for Respondent; Thomas E. Bischof, Esquire, represented Complainant at hearing.

^{1/} Parallel citation to the United States Code is attached hereto.

The Act provides, in pertinent part, as follows:

Sec. 3. Registration of Pesticides.

"(a) Requirement. Except as otherwise provided by this Act, no person in any State may distribute, sell, offer for sale, hold for sale..., to any person any pesticide which is not registered with the Administrator."

Sec. 12. Unlawful Acts.

"(a) in General. - -

"(1) . . . it shall be unlawful for any person in any State to distribute, sell, offer for sale, hold for sale, ship, deliver for shipment, or receive and (having so received) deliver or offer to deliver, to any person - -"

"(A) any pesticide which is not registered under Section 3, . . ."

Sec. 14. Penalties

"(a) Civil Penalties.

(1) In General. 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."

"Section 2(u) Pesticide. The term 'pesticide' means (1) any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, . . ."

On consideration of the proposed Findings of Fact, Conclusions of Law, Briefs and Arguments filed by the parties herein, I make the following:

FINDINGS OF FACT

1. The Respondent is an incorporated business owned and operated by Marjorie and Henry Olfe, husband and wife.
2. Respondent's business is the servicing of swimming pools, using a 9% solution of sodium hypochlorite for the control of algae.
3. The 9% solution of sodium hypochlorite is also sold separately from service calls and is, by Respondent, referred to, packaged and sold as "Aqua Chlor Concentrate" or "Aqua Chlor" (Exh. C-3) though

frequently billed to a customer as "bleach"(Exh. C-9; T63:84).

4. Sales of Aqua Chlor, Respondent's product, were made to William Allen at the Holiday Inn South; in St. Louis, Missouri on August 7, August 13, and August 25, 1979 (Exh. C-9).

5. On or about April 23, 1979, Respondent entered into a contract with Vertex Chemical Corporation, Dupou, Illinois under which Respondent was, by Vertex, authorized to distribute the Vertex product.

6. On the date of the contract, referred to above, an officer of Vertex agreed to submit to EPA Respondent's "Application for Supplemental Registration of Distributor".

7. No action by EPA on said application so submitted for Respondent was forthcoming; however, as a result of telephone calls made by it to EPA in Washington, D. C. in May, June and July, 1979, Respondent was told that the application was being processed.

8. In August 1979, one of the personnel at EPA in Washington, D. C., told Respondent that "she did not have (application)". A new and different "Application for Supplemental Registration of Distributor" dated August 31, 1979 (Exh. C-2) was submitted to EPA by Respondent through Vertex. Said application was received by EPA on September 5, 1979 and approved on October 17, 1979.

9. The instructions on said form "Application for Supplemental Registration of Distributor" provide (Exh C-2) that the application must be submitted by the Basic Registrant (who, in the instant case, is Vertex), and that products may not be shipped under distributor brand labels until after approval by the Agency is granted.

10. The Chief, Toxic and Pesticides Branch of EPA Region VII, by letter of July 26, 1979 (Exh C-12) advised Respondent that its product was not registered; enclosed product registration forms, and further advised that "until such time as you are notified the product is registered,

it is unlawful to distribute, sell, or offer it for sale".

11. It was stipulated by the parties that Respondent's first said Application for Supplemental Registration of its products was submitted by Vertex on April 23, 1979, and this was the first and only time that difficulty was experienced by Vertex in obtaining approval within a reasonable time; and further that a Vertex representative (a subordinate of Mr. Moisiso, Vertex President) expressed the opinion to Respondent's owners that it was proper to sell subject product in the interim (after application and prior to EPA approval); but such representation did not come from anyone in the U. S. EPA.

12. The gross sales of Respondent for a representative 12-month period totaled \$374,268.00 (Exh R-5).

CONCLUSIONS OF LAW

1. The sales by Respondent of its product Aqua Chlor on August 7, August 13, and August 25, 1979 were in violation of Section 12 of the Act, for the reason that said product was not then registered in accordance with Section 3 of the Act in that the supplemental registration of subject product was actually approved on October 17, 1979 after application therefor was made on August 31, 1979. (Exh. C-2).

2. The fact that a representative of Vertex Chemical Corporation (Vertex) expressed the opinion to Respondent's owners that they had authority to sell subject product in the interim (after the date of application for and prior to approval of Respondent's application for Supplemental Registration) is entitled to some weight on the question of Respondent's good faith in view of the requirement by EPA that the submission of Respondent's said application be, and the fact that it was, made by the basic registrant (Vertex).

3. The fact that the certified letter from EPA Region 7 dated July 26, 1979 advised Respondent's that, "until such time as you

are notified the product (Aqua Chlor Concentrate) is registered, it is unlawful to distribute, sell, or offer it for sale" evidences that Respondent's sales of their said product from and after their receipt by them of said letter was with actual knowledge that any such sales were unlawful and in violation of the Act in the particulars charged in the subject complaint.

4. Intent is not an element of the violation here charged for which a civil penalty is sought; however, intent should be and will be properly considered in determining the gravity of the misconduct comprising the violation which determination will be made pursuant to Section 14(a)(4) of the Act, and the applicable regulations, 40CFR 168.46(b) and 40CFR 168.60(b).

5. An appropriate civil penalty to be assessed under the facts here presented is \$650.00 and such amount should be and is hereby proposed as a proper amount to be assessed as a civil penalty to be paid by the Respondent. (Exh R-5; 40CFR 168.60(b)(3)).

DISCUSSION

I

On the record, sales of Respondent's product, Aqua Chlor, were made on August 7, August 13, and August 25, 1979. On said dates said product was not registered with the Complainant Agency and therefore each and all of said sales were in violation of Section 12 of the Act.

Respondent, in making the argument that it had the right to sell Vertex, concludes that even though subject product contained Respondent's label and trade-name, that it was in fact selling Vertex which was properly registered. It should be sufficient to point out that under the Act and regulations the 9% solution, when repackaged, became Respondent's product requiring registration (Sec. 2(Z)); and if it be

considered that the product sold was Vertex, it was misbranded in that the container or wrapping thereon did not conform to pertinent provisions of the Act. (See Section 2(q)(1)(B)). The foregoing but demonstrates the fallacy of Respondent's argument and that Complainant's charge that Respondent sold its product Aqua Chlor when it was unregistered is adequately supported on this record.

II

Respondent cites U. S. Ex rel C. Hobart Keith v. Sioux Nation Shopping Center et al.^{2/} In that case, statutory penalties were sought against 128 defendants for "trading on - - Indian Reservation without having obtained a license from the Commissioner of Indian Affairs", in violation of 25 USC Sec. 264. The Court of Appeals affirmed the opinion of the district court which dismissed holding that bureaucratic non-feasance "makes it impossible to obtain the federal traders license - -". (Emphasis supplied). Said holding was premised on credible testimony that attempts to implement a licensing program (under said statute) had been abandoned and forms for obtaining such license "were not even available". Further, the court there found that a tribal tax and requirement, by the Oglala Sioux Tribe, that businesses trading on the Reservation buy permits, served the same function as the trader's license in that a protection against unscrupulous traders was thus afforded.

The distinction present in the instant case is readily apparent. Here the registration was delayed, but was not unobtainable. It was, in fact, later obtained, after reapplication, approximately two

^{2/} Opinion filed by the U.S. Court of Appeals, 8th Circuit, on November 25, 1980, bearing Case No. 80-1404. The civil action brought in the U.S. District Court of South Dakota was a qui tam action brought by an informer for the Government under a statute that establishes a penalty which, if and when assessed, is divided between the Government and the person who commences the suit.

months following the violations charged. Further, the registration of Respondent's product is essential "to provide protection of the public health" by requiring that the product, when sold or offered for sale, bear an approved label attesting to its efficacy and safety. Absent such registration requirement, no alternative provision is here available, as in Keith, to serve the same function or to substantially accomplish the provisions of Section 3.

On this record, it is logically concluded by Respondent that it was the subject of undue delay in the processing by Complainant of its April 1979 application for supplemental registration. This finding does not alter the further finding that Respondent's August 1979 sales were in violation of the Act. Nor is a defense stated by the showing that Respondent had in many known instances acted more expeditiously.

CIVIL PENALTY

In considering the amount of the civil penalty to be assessed, I have considered the elements set forth in 40CFR 168.46(b) which adopts the provisions of 40CFR 168.60(b) which provides, in pertinent part, as follows:

"168.60(b) - - -"

"(1) In evaluating the appropriateness of such proposed penalty, the Regional Administrator must consider, (i) the gravity of the violation, (ii) the size of respondent's business, and (iii) the effect of such proposed penalty on respondent's ability to continue in business.

(2) In evaluating the gravity of the violation, the Regional Administrator shall also consider (i) Respondent's history of compliance with the Act, or its predecessor statute and (ii) any evidence of good faith or lack thereof".

Respondent is a business operated by Marjorie and Henry Olfe, husband and wife. Their business is the servicing of swimming pools using 9% solution of sodium hypochlorite which they obtain from the Vertex Chemical Corporation from nearby Dupon, Illinois.

Respondent also packages and sells said product, after it is repackaged and labeled with their own brand name "Aqua Chlor Concentrate" or "Aqua Chlor", independent of the service available from them. In instances where a product is repackaged as here, the applicable regulations require that registration be obtained after application made by Respondent for a "Supplemental Registration of Distributor". As it is contemplated that the manufacturer will, by contract, authorize the repackaging and sale of its product by the Distributor, it is further required that the application of the Distributor (as Respondent here) must be submitted by the manufacturer or the Basic Registrant. One obligation, placed on the Basic Registrant, (that is not required of a Supplemental Registrant) is the submission of costly toxicological and scientific studies. The handling by U.S. EPA of the Supplemental Registrations is somewhat more routine. Certain items are reviewed and approval is made by a section separate from that which receives and reviews the more technical applications for basic or new product registrations. This record reveals that the separate section receives and approves the applications for Supplemental Registration by the hundreds. (T. 27).

In the premises, I find that the gravity of the violation, when considered from the standpoint of gravity of the misconduct of Respondent, is moderate.

I find as a fact that Respondent had actual knowledge of the illegality of its holding for sale subject unregistered product by reason of the notice contained in the letter (Exh C-12) received by Respondent from U.S. EPA Region VII. However, Respondent was advised by a Vertex representative that sales of subject product were permitted during the interim period (after application and prior to approval). I find said fact both material and significant for the reason that Vertex had previously experienced a routine and prompt approval of such Supplemental Applications, and could well have here made said

wrongful representation to Respondent with some conviction as to its correctness. On consideration of this fact in conjunction with the regulatory requirement that Respondent's application be submitted to the agency by Vertex makes it apparent that Respondent was, under the circumstances, disposed to look to Vertex for advice regarding the handling and sale of subject product.

Such considerations, though patently equivocal, are made in the interest of fairness. In the assessment of a civil penalty, the finding of the element of intent^{3/} is not contemplated. However, the absence or presence of intent can and should be considered in determining good faith or a lack thereof.

From the standpoint of gravity of harm, the failure to register the product demands more weight. It is unquestioned that for the subject product to be legally registered giving Respondent the legal authority to hold said product for sale, it was required to have in hand the registration notice and a copy of the label as it appears in the market place, bearing the stamp of approval by EPA (T.23).

As was stated in Schulte Paint and Lacquer Manufacturing Company, Docket No. I.F. & R. VII-272C (Dec 1977):

"The Act is regulatory in nature. The requirement of registration evinces the principle that the legislation is remedial in character and has an overriding purpose of providing protection of the public health and giving assurance that products marketed serve the public with efficacy and safety".

It should be emphasized that an important concern in regulatory cases is that any failure to apply adequate sanctions in instances where the Act is violated will, in effect, invite violations in increasing numbers which can ultimately frustrate and defeat the scheme of regulation required and contemplated by the Act. (In re The Parawax Company, I.F.&R. Docket No. VII-183C, June 25, 1976).

^{3/} It should be noted that Section 12 does not provide that the unlawful acts, there mentioned, must be done "knowingly". (CF. Sec. 14(b), e.g.) which provides for "Criminal Penalties").

Respondent's violation, by itself, may appear unimportant, or even trivial; however, the instant violation taken together with that of many others is far from trivial. Wickard v Filburn, 317 U.S. 111, 63 S. Ct. 82.

I find that the size of Respondent's business is characterized by its gross sales as shown by this record, amounting to approximately \$375,000 over a 12-month period. I further find that payment by Respondent of the penalty proposed and, particularly, the penalty hereinbelow assessed, will not affect its ability to continue in business.

On consideration of all of the elements properly to be considered in the assessment of a civil penalty, I find that an appropriate civil penalty to be assessed is \$650.00 and I recommend the assessment of a civil penalty in that amount.

This Initial Decision and the following proposed Final Order assessing a civil penalty shall become the Final Order of the Regional Administrator unless appealed or reviewed by the Regional Administrator as provided in 40CFR 168.46(c):

"FINAL ORDER

Pursuant to Section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, a civil penalty of \$650.00 is assessed against Respondent Sunset Pools of St. Louis, Inc, for violations of said Act which have been established on the basis of Complaint issued herein, and Respondent is ordered to pay same by Cashier's or Certified Check, payable to the United States Treasury within sixty (60) days of the receipt of this Order."

This Initial Decision is signed and filed this 5th day of December, 1980 at Kansas City, Missouri.


Administrative Law Judge

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT, (FIFRA) AS AMENDED

ON OCTOBER 21, 1972, 86 STAT. 973, PUBLIC LAW 92-516

NOVEMBER 28, 1975, 89 STAT. 751, PUBLIC LAW 94-140

AND SEPTEMBER 30, 1978, 92 STAT. 819, PUBLIC LAW 95-396

Parallel Citations

<u>Statutes at Large</u>		<u>7 U.S.C.</u>	<u>Statutes at Large</u>		<u>7 U.S.C.</u>
Section 2		Section 136	Section 15		Section 136m
3		136a	16		136n
4		136b	17		136o
5		136c	18		136p
6		136d	19		136q
7		136e	20		136r
8		136f	21		136s
9		136g	22		136t
10		136h	23		136u
11		136i	24		136v
12		136j	25		136w
13		136k	26		136w-1
14		136 l	27		136w-2
			28		136w-3
			29		136w-4
			30		136x
			31		136y

CERTIFICATE OF SERVICE

I certify that a copy of the Initial Decision was forwarded to the following on this the 8th day of December, 1980.

Mr. W.W. Sleater
1122 Chromalloy Plaza Building
120 South Central Avenue
Clayton, Missouri 63105

Certified Mail
Return Receipt Requested

Mr. Thomas E. Bischof
Enforcement Division
Environmental Protection Agency
324 East 11th street
Kansas City, Missouri 64106

Hand-carried

Dr. Kathleen Q. Camin
Regional Administrator
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Rita Riches