

11/18/76

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
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Kansas City, Missouri 64108

IN THE MATTER OF:

WELCO MANUFACTURING COMPANY, INC.
North Kansas City, Missouri

DOCKET No. I.F.&R. VII-197C

Marvin E. Jones
Administrative Law Judge

INITIAL DECISION

On June 14, 1976, Complainant, the US Environmental Protection Agency, filed its Complaint and Notice of Opportunity for Hearing against the Respondent, Welco Manufacturing Company, Inc. (WELCO), proposing imposition of a civil penalty of \$1980.00 and alleging that Respondent violated 7 U.S.C. 1369(a) and 7 U.S.C. 136j(a)(1)(A), which sections prohibit the sale or delivery of any pesticide which is not registered, in that a certain product, Wel-Cote Tri-Sodium Phosphate, a pesticide, was on February 26, 1976 shipped by Respondent from its place of business in North Kansas City, Missouri, to Des Moines, Iowa, although said product was not registered. [The term "pesticide" is defined (7 U.S.C. 136(u) as any substance intended for...mitigating any pest. "Pest" as defined in 7 U.S.C. 136(t) includes any "fungus". 7 U.S.C. 136(k) provides in pertinent part: "The term "fungus" means any non-chlorophyll-bearing thallophyte (sic), as for example, rust, smut, mildew..."]

Respondent, on June 25, 1976, answered the Complaint by a letter signed by Derrell Sell, one of its officers, and there admitted the violation alleged. Said answer further explained that the act was not committed "knowingly"--that, since all of the products by it manufactured and sold are Drywall Finishing Compounds and Paint Sundries, it has felt "no reason to keep abreast of Insecticide, Fungicide and Rodenticide regulations", and since subject product

is used as a "cleaner" it did not recognize it would fall within the said regulations. It further stated:

"Because we did not wilfully or knowingly perform said violation and because the...potential hazard from our sales was practically nil and because the total sales of our...product was so small (less than 1% of our total sales), we feel the amount of the proposed penalty is much too great and herewith request a hearing..."

Adjudicatory Hearing was set for October 28, 1976, in Kansas City, Missouri.

On October 27, 1976, prior to Hearing, the parties filed for the record an Agreement of Facts, which is as follows:

1. That on or about February 26, 1976, the Respondent shipped the product WEL-COTE TRI SODIUM PHOSPHATE from North Kansas City, Missouri, to Des Moines, Iowa.
2. That the label of said product contained claims such as "mildew remover."
3. That the product was not registered as a pesticide under Section 3 of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (hereinafter FIFRA, as amended).
4. That the Respondent's principal business is the manufacturing and sale of drywall finishing compounds and paint sundries.
5. That at no time has the Respondent had any pesticides registered under FIFRA, as amended, or its predecessors.
6. That in 1975 the Respondent has gross annual sales from all business activities in excess of \$2,000,000.
7. That the Respondent had no actual knowledge that the product was required to be registered as a pesticide under Section 3 of FIFRA, as amended.

At the Hearing, Berrell Sell, Respondent's said officer, admitted the violation and testified to essentially the same matter contained in his answer, supra. In addition, he stated that the label on said product has now been amended so that the claim that said product is a "mildew remover" has been stricken from the label and the

product is for this reason no longer considered a "Pesticide" and thus no longer within the purview of the Act.

In the premises, the only issue unresolved by the parties is whether a civil penalty should be imposed on Respondent for said violation and, if so, what amount is appropriate under the facts and circumstances presented.

As stated in the recent decision IN THE MATTER OF APPLIED BIOCHEMISTS, INC. (November 1976) Docket No. I.F.&R. V-329-C, l.c. 7:

"In considering the instant case, it must be kept in focus that the applicable laws and regulations promulgated pursuant thereto are "regulatory" in nature, with the objective of controlling and directing the use, shipment, distribution, and sale of "pesticides" so that, where present, the danger of undesirable side effects on human health and the environment can either be avoided or completely alleviated."

It was pointed out that registration and labeling are regulatory tools essential to effective regulation and then further stated:

"Failure to apply appropriate sanctions where the Act is violated will, in effect, invite violations in increasing numbers which could ultimately frustrate and defeat the scheme of regulation contemplated by the Act."

Section 168.46(b) of the Rules of Practice provides that "the Administrative Law Judge may, at his discretion, increase or decrease the penalty from the amount proposed to be assessed in the Complaint."

In determining the amount of penalty to be assessed, the following factors must be considered under Section 14(a)(3) [7 U.S.C. 1361(a)(3)].

1. The size of Respondent's business.

2. The effect on Respondent's ability to continue in business; and

3. The gravity of the violation

Section 168.60(b) thereof provides that in evaluating the gravity of the violation there shall also be considered Respondent's history of compliance with the Act and any evidence of good faith or lack thereof.

Respondent is relatively large in size with gross annual sales, in 1975, exceeding \$2,000,000 and I do not find that assessment of a penalty, even in the amount proposed, will adversely affect its ability to continue in business.

I have considered gravity of the violation, from pertinent parts of this record, from the standpoints of gravity of harm and gravity of misconduct. Respondent's statement that the subject product is a "cleaner" and that deletion of the claim that it is an effective "mildew remover" from the label, removes such product from the purview of the Act, is unchallenged and not controverted. It is also accepted that Respondent had no actual knowledge that the product was required to be registered under the Act. In this regard it should be pointed out that intent is not an element of the offense charged under the civil penalty provision of FIFRA, amended. [cf United States v Dotterweich, 320 U.S. 277 (1943)].

Accordingly, it is concluded that the potential of subject product for causing injury or harm to human health or to the environment is minimal. Respondent's conduct in its failure to register said product, while not excused, is mitigated by the fact that it did not have actual knowledge of pertinent registration requirements of the Act which is attributable to the further evidence that over 99% of its annual sales

consist of non-pesticide products. The above facts bolster Respondent's profession of the exercise of good faith in this instance. I further find that Respondent has no history of previous violations.

The above constitutes my Findings of Fact and Conclusions of Law, and, on consideration of the same, I conclude that a civil penalty in the sum of \$300.00 is appropriate.

Having considered the entire record and based on the Findings of Fact and Conclusions herein, it is proposed that the following Final Order be issued:

"FINAL ORDER"^{1/}

Pursuant to 7 U.S.C. 1361(a)(1), a civil penalty in the sum of \$300.00 is hereby assessed against Respondent Welco Manufacturing Company, Inc., for violation of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, which has been established on the basis of the Complaint issued against said Respondent on June 14, 1976, and Respondent is Ordered to pay the 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 18th day of November 1976, at Kansas City, Missouri.


ALJ

^{1/} The Initial Decision and 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 40 CFR 168.46(c).