UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

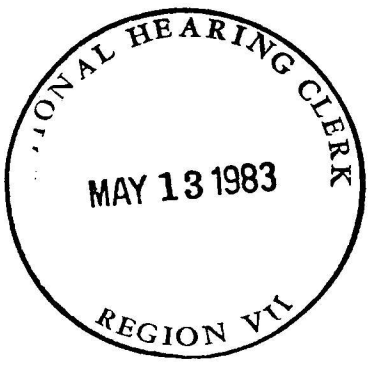
In the Matter of	)	IF&R Docket No. VII-547C-82P
	)	
Holmquist Grain and Lumber Company	)	
	)	
Respondent	)	

1. The sale and holding for sale of an unregistered pesticide (a "rat bait" produced by the mixture of oats with d-CON Concentrate, a registered pesticide) was unlawful, even though said mixture was otherwise lawfully utilized for Respondent's "own use."

2. Violations which appear to be minor, absent any showing of injury, when taken together with many others are "far from trivial" and any failure to apply adequate sanctions will frustrate, if not defeat, the scheme of regulation legislated for protection of public health and the environment.

3. Sale of Respondent's "rat bait," which is a mixture of oats with d-CON Concentrate, was a single offense, though characterized as unlawful by both Sections 12(a)(1)(A) and 12(a)(2)(L) of the Act, in that neither said product nor Respondent's producing establishment were registered as required by the Act. The two charges, based on violations of said subsections, are not substantially distinguishable, as both characterize one instance of holding for sale as unauthorized and unlawful.

4. Intent to violate is not an element to be considered in establishing the violation charged and in determining whether assessment of a civil penalty is appropriate; however, lack of intent should be considered in determining the extent of misconduct of Respondent.



Appearance for Respondent:

Mr. Larry Larson
Secretary and Treasurer
Holmquist Grain and Lumber Company
Post Office Box 127
Oakland, Nebraska 68045

Appearance for Complainant:

Rupert G. Thomas, Esquire
Office of Regional Counsel
U.S. Environmental Protection Agency
Region VII
324 East 11th Street
Kansas City, Missouri 64106

INITIAL DECISION
by
Administrative Law Judge
Marvin E. Jones

In a Complaint filed August 13, 1982, it is alleged that Respondent, Holmquist Grain and Lumber Company, of Coleridge, Nebraska (hereinafter "Holmquist"), violated Sections[1] 12(a)(1)(A) and 12(a)(2)(L) of the Federal Insecticide, Fungicide and Rodenticide Act (hereinafter "FIFRA", or "the Act"), as amended, in that:

1. Respondent Holmquist held for sale an unregistered pesticide; and
2. Produced said pesticide in an unregistered establishment.

The first Count specifically alleges that, on or about February 3, 1982, Holmquist held for sale at its establishment in Coleridge, Nebraska, fourteen (14) one-pound containers of d-CON Rat and Mice Bait, a pesticide which was packaged, labeled and released for shipment though unregistered under Section 3 of the Act with the Environmental Protection Agency (hereinafter "EPA" or "the Agency"), in violation of said Section 12(a)(1)(A).

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[1] Comparative table citing the parallel sections of 7 USC is attached to this Initial Decision as Attachment A.

For said violation, Complainant proposes that a civil penalty be assessed in the amount of $2200.

The second Count alleges that Holmquist produced said d-CON Rat and Mice Bait at its establishment in Coleridge, Nebraska, which establishment is not registered, pursuant to Section 7 of the Act, in violation of said Section 12(a)(2)(L), for which an additional civil penalty of $1800 is proposed.

An adjudicatory hearing was held in the District Courtroom in Tekamah, Nebraska, on March 23, 1983. On the basis of the record, including the evidence elicited at the hearing and the proposed findings of fact, conclusions of law, brief and argument filed herein, I make the following

FINDINGS OF FACT

1. The Respondent, Holmquist Grain and Lumber Company, is a Nebraska corporation which operates 12 different elevators throughout northeast Nebraska, all of which are small country elevators that handle feed and grain (T. 9).

2. Respondent does not manufacture feed, chemicals, fertilizers or any other product.

3. The elevator at which the alleged violation occurred is situated in Coleridge, Nebraska, an incorporated town with approximately 500 inhabitants, and serves the surrounding farm area.

4. Said installation can be accurately described as a small country elevator (R. Ex. 7, 8, 9 and 10; T. 9).

5. It is stipulated that the gross sales of Respondent for the 12-month period ending March 31, 1982, were $24,192,000, representing sales of the 12 different elevators, referred to in Finding No. 1.

6. Total sales for said 12-month period at the Coleridge elevator were approximately $850,000. All but $5530 of this amount was from the sale of grain (T. 25).

7. The parties hereto stipulated, on the record, that Respondent admits the violations charged, to wit:

A. That their establishment, in which subject product (a mixture of one part d-CON Concentrate with six parts rolled oats for use as "rat bait") was produced, was not then and is not now registered with the EPA as a pesticide-producing establishment, as required by law, and

B. That subject product, samples of which were purchased by an EPA consumer safety officer (CSO) on or about February 3, 1982, was a product not registered with the EPA as required by law (Section 3 and Section 7 of the Act).

8. "d-CON Concentrate" (R. Ex. 1) and "d-CON Ready-Mixed" (R. Ex. 2) are commercial rodenticides manufactured by the d-CON Company, Incorporated, Subsidiary of Sterling Drug, Incorporated, of Montvale, New Jersey (Sterling), and are products which are handled by Respondent as stock in trade. Both of said products and the producing establishment are registered by Sterling with EPA as required by law (T. 12).

9. In the interest of keeping their stations clean and for protection of their grain and the general environment, Respondent has for years used said mixture of d-CON Concentrate and rolled oats, found to be effective for the eradication of rats and mice from said premises (T. 11-12).

10. Said mixture has been mixed at time of use by Respondent's employees with the use of a five- to ten-gallon container in which the two ingredients are stirred with a stick (T. 17). Because of inquiries from farm patrons as to what Respondent used for "rat bait," and consequent requests that Respondent "mix them some up," Respondent complied with their requests, taking rolled oats from their elevator and d-CON off the shelf, placing said ingredients in the said 10-gallon container and mixing, which resulted in the product which is the subject of the instant inquiry and which was purchased by the EPA CSO.

11. A total of approximately 20 pounds was mixed by Respondent; what remained, after said farmers bought what they needed, was bagged in one-pound plastic bags which also contained a tag stating weight and amount of "warfarin" contained in said mixture (T. 16).

12. An understanding existed between Respondent and its farm patrons, who purchased said "mixture," that Respondent produced same as an accommodation and not to produce a profit (T. 16).

13. Subject mixture was not advertised for sale. Because of the size of the community, the manager of the Coleridge elevator knows all the customers who come in, as well as the location in which the mixture will be utilized by them, and is able to discuss with them the purpose and manner of use (T. 30).

14. Prior to February 3, 1982, Respondent's Coleridge manager was unaware that it was unlawful to produce and hold for sale or to sell said mixture T. 23).

15. Upon being advised by the EPA of its violations and that the production for sale of said mixture was unlawful, Respondent recognized that its action violated the Pesticide Law and Regulations and immediately desisted from further such unlawful activity (T. 24); it retained the remaining packages of said mixture for "its own use" (T. 10).

16. d-CON Concentrate, Sterling's registered product, contains the following warning:

"CAUTION. Keep out of the reach of children."

In addition, the packaging of said d-CON exhibits an "Active Ingredient" statement on the front and a further cautionary statement on the side, describing the character of and perils that can be experienced from the chemical ingredients therein contained (T. Ex. 1).

CONCLUSION OF LAW

1. Respondent admits the violations charged (see Finding No. 7). The only issue for determination herein is whether a civil penalty should be assessed for subject violations and, if so, the amount of same.

CIVIL PENALTY

I find that a Civil Penalty is here appropriate on consideration of the Act and regulations pertinent hereto.

In determining the amount of the civil penalty to be assessed, Section 14(a)(3) (7 USC 1361(a)) requires that I shall consider the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business and the gravity of the violation. 40 CFR 22.35(c) (Rules of Practice) provides that, in addition to the above criteria, I must consider (1) Respondent's history of compliance and (2) evidence of good faith or lack thereof.

The above is amplified in the Preamble issued by EPA on July 31, 1974, 39 FR 27712(1):

"(1) Factors considered in determining the proposed civil penalty.

"(a) Gravity of violation. One determinant of the amount of a proposed civil penalty is the gravity of the violation. The gravity of any violation is a function of (1) the potential that the act committed has to injure man or the environment; (2) the severity of such potential injury; (3) the scale and type of use anticipated; (4) the identity of the persons exposed to a risk of injury; (5) the extent to which the applicable provisions of the Act were in fact violated; (6) the particular person's history of compliance and actual knowledge of the Act; and (7) evidence of good faith in the instant circumstance."

With reference to points 1 and 2, though the possible extent of injury could be severe, I find that under the facts shown by this record, the possibility of such injury is lessened by circumstances existing, as detailed below, relative to sale, the identity of the purchasers, and the knowledge by Respondent's manager of such intended use. As to Point 3, approximately 20 pounds of said mixture was produced by Respondent. Of this amount, no more than six pounds was sold and, after the visit by EPA's CSO, the mixture was no longer held for sale, sold or otherwise made available to members of the public, as Respondent placed the remaining 14 pounds of the mixture with other rat bait to be used "at its own facility." With reference to Point 5, the extent of the violation was quite limited as indicated by the above.

Further, the evidence is convincing, with reference to Point 4, that exposure to the risk of injury was not extensive. The mixture was produced at the request of patrons of Respondent's elevator who were in need of an effective rat bait. It was understood that Respondent produced same as an accommodation and not for profit. Respondent's manager at the small country elevator at Coleridge, Nebraska (a farm community with about 500 inhabitants) knows all the customers who come in. He also is conversant with the locations where

the mixture will be utilized and, in the usual instance, was able to discuss with each customer the purpose and manner of use. Respondent's manager was not aware that it was unlawful to hold for sale or to sell said mixture which his employer had for some time utilized for "its own use." In this respect, we have often pointed out that "intent" is not an element of the violation; but the same can be considered in determining good faith or the lack thereof. Good faith was also exhibited by Respondent in immediately desisting from further violation of the Act.

A compelling consideration is the character of the pesticide and the significant harm that could possibly result to humans, domestic animals and pets, should subject mixture be carelessly stored or disseminated. Respondent's Exhibit 1, the d-CON Concentrate (used with oats in producing the subject mixture), provides on its packaging the following cautionary directions and warnings:

> "CAUTION: Keep away from humans, domestic animals and pets."

It then directs that, if ingested, Vitamin K should be administered, combined with blood transfusions. It further states, in pertinent part:

> "IMPORTANT: Baits should be placed in areas not accessible to children, pets, wildlife or domestic animals."

Additional directions emphasize the toxic and lethal character of the concentrate or the resultant mixture.

Though Respondent's violation may appear minor, absent any showing of injury, it must be recognized that this violation, taken together with that of many

others, is far from trivial. Any failure to apply adequate sanctions where the Act is violated will invite increasing violations. This certainly would frustrate, if not defeat, the scheme of regulation legislated for protection of the public (Wickard vs. Filburn, 317 US 111; Re I.D. Russell, 1 F&R No. VII-189c (1976)).

I have further concluded that a single offense is shown by this record. The sale of said mixture is the offense here complained of and, though it is violative of both Subsections (1)(A) and 2(L) of Section 12(a) of the Act, the first violation charged is not substantially distinguishable from the second. Both subsections merely characterize the subject sale as unauthorized and thus unlawful.

It is conceded that it was not unlawful for Respondent to formulate said mixture for its "own use." It was its action in "sharing" said mixture, its sale, for the accommodation of its patrons, that was unlawful[1], in that it was not registered, and was violative of Section 12(a)(2)(L), for the reason that the establishment producing the mixture was not registered with EPA. The Preamble to the civil penalty guidelines, 39 FR 27711, states:

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[1] It should be pointed out that Respondent's unlawful sale of subject mixture could expose it to the hazard of civil liability "to any one who sustains injury from its dangerous condition" (see McWilliams vs. Dawson, 48 F.S. 538(4); Wright vs. Carter, 244 F.2d 53, l.c. 57(7), [C.A. 1957]). Violation of provisions of the Act (FIFRA), characterizing Respondent's failure to provide the required labeling and warning as unlawful, would likely be deemed "negligence per se" in the event damages are sought for injuries resulting from said dissemination of a product known by Respondent to be imminently dangerous, on the theory of "failure to warn".

"Not every charge which may appear in the Complaint shall be separately assessed. Where a charge derives primarily from another charge . . . for which a penalty is to be properly assessed, the subsequent charge may not warrant a separate assessment."

The two charges are not substantially distinguishable, as both violations characterize one instance of "holding for sale" as being unlawful.

On consideration of the elements hereinabove set forth and of the facts appearing in the record, along with Complainant's brief and argument, I find that an appropriate civil penalty to be assessed herein is the sum of $1080 and I recommend adoption of the following

PROPOSED FINAL ORDER[1]

1. Pursuant to Section 14(a)(1) of the Act, a civil penalty of $1080 is assessed against Respondent, the Holmquist Grain and Lumber Company, Box 193, Coleridge, Nebraska 68727, for violations of said Act which have been shown on the basis of the Complaint herein.

2. Payment of the full amount of the Civil Penalty assessed shall be made, within 60 days of the Service of the Final Order upon Respondent, by forwarding to the Regional Hearing Clerk, United States Environmental Protection Agency, Region VII, 324 East 11th Street, Kansas City, Missouri 64106, a Cashier's or Certified Check payable to the United States of America.

DATE May 12, 1983

Marvin E. Jones
Administrative Law Judge

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[1] 40 CFR 22.27(e) provides that this Initial Decision shall become the Final Order of the Administrator within 45 days after its service upon the parties unless (1) an appeal is taken by a party to the proceedings, or (2) the Administrator elects, sua sponte, to review the Initial Decision.

ATTACHMENT

Parallel Citations to Sections of FIFRA
in the Statutes at Large and in Title 7, United States Code,
Supp. V (1975)

Statutes at Large	7 U.S.C.	Statutes at Large	7 U.S.C.
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	136x
14	136 l	27	136y

CERTIFICATION OF SERVICE

I hereby certify that, in accordance with 40 CFR 22.27(a), I have this date forwarded to the Regional Hearing Clerk of Region VII, U.S. Environmental Protection Agency, the Original of the above and foregoing Initial Decision of Marvin E. Jones, Administrative Law Judge, and have referred said Regional Hearing Clerk to said section which further provides that, after preparing and forwarding a copy of said Initial Decision to all parties, she shall forward the Original, along with the record of the proceeding, to the Hearing Clerk, who shall forward a copy of said Initial Decision to the Administrator.

DATE: May 12, 1983

Mary Lou Clifton

Mary Lou Clifton
Secretary to Marvin E. Jones, ADLJ

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION VII
324 EAST ELEVENTH STREET
KANSAS CITY, MISSOURI - 64106

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IN THE MATTER OF	)	
	)	
The Holmquist Grain and Lumber Company	)	Docket No. I.F.&R. VII-457C-82P
	)	
	)	
Respondent	)	

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ... (45 Fed. Reg., 24360-24373, April 9, 1980), I hereby certify that the original of the foregoing Initial Decision issued by Honorable Marvin E. Jones, along with the entire record of this proceeding was served on the Hearing Clerk (A-110), Environmental Protection Agency, 401 M Street, S.W., Washington, D.C. 20460 by Certified Mail, Return Receipt Requested; that a copy was hand-delivered to Counsel for Complainant, Rupert G. Thomas, Office of Regional Counsel, Environmental Protection Agency, Region 7, 324 East 11th Street, Kansas City, Missouri; and that a copy was served by Certified Mail, Return Receipt Requested on Respondent, Larry Larson, Secretary and Treasurer, Holmquist Grain and Lumber Company, P.O. Box 127, Oakland, Nebraska 68045.

If no appeals are made (within 20 days after service of the Decision), and the Administrator does not elect to review it, then 45 days after receipt this will become the Final Decision of the Agency (45 F.R. Section 22.27(c), and Section 22.30).

Dated in Kansas City, Missouri this 16th day of May 1983.

Rita Ricks

Rita Ricks
Regional Hearing Clerk

cc: Hon. Marvin E. Jones

Robert L. Peters
President
Holmquist Grain and Lumber Company