2/28/77

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of	)	
	)	
Animal Repellants, Inc.	)	I.F. & R. Docket No. II-123C
	)	
Respondent	)	INITIAL DECISION

Preliminary Statement

This is a proceeding under section 14(a)(1) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, 7 U.S.C. 136 l(1) for the assessment of a civil penalty for shipping the unregistered economic poison (pesticide) called Black Widow Spider Spray, from Buffalo, New York to Griffin, Georgia, on or about February 2, 1973. It is alleged in the complaint, dated March 25, 1976, that the shipment of the unregistered product was in violation of sections 3a(1) and 4 of FIFRA (7 U.S.C. 135(a)(1) and 135b).[1/] A penalty of $2,380 was proposed to be assessed. The respondent filed an answer stating its opinion that the product was registered, and requesting a hearing.

The complainant was represented by Susan C. Levine, Esq., Enforcement Division, EPA, New York, and the respondent was represented by William T. Johnson, Esq., Griffin, Georgia. Proposed findings of

1/ The registration requirements of FIFRA prior to the 1972 amendments were continued in effect until superseded by new regulations. See Federal Environmental Pesticide Control Act of 1972 (86 Stat. 973) section 4(b) and 4(c)(1).

fact, conclusions, and a brief have been submitted by complainant. The respondent has submitted a brief. These have been carefully considered by the undersigned.

After considerable negotiations the parties entered into a stipulation and waived their right to an oral hearing and agreed that the case be submitted to the Administrative Law Judge on the basis of the stipulation.

The stipulation includes the following pertinent facts: The respondent, Animal Repellants, Inc., is a wholly-owned subsidiary of Osmose Wood Preserving Company; the respondent conducts business in Buffalo, New York and Griffin, Georgia; the product, Black Widow Spider Spray, is an economic poison as defined in 7 U.S.C. 135(a); on November 10, 1971, the respondent applied to EPA for registration of the product in question; as of October, 1972 the respondent had furnished EPA with information regarding the product in question, including copy of labeling, description of all tests made and results thereof, complete chemical formula, a request that the product be considered for use against all spiders; within a day or two after September 8, 1972, the respondent received in the mail from the Pesticide Registration Division of EPA a letter dated September 8, 1972[2/] which stated that the product in question would be acceptable for registration provided finished labeling is submitted incorporating the following revisions:

2/ Paragraph 13 of the stipulaton incorporates this letter.

1. Add the following caution in a prominent position.

"Do not use in edible products areas of food processing plants, restaurants or other areas where food is commercially prepared or processed. Do not use in serving areas while food is exposed."

2. The front panel must bear the following additional precautionary labeling:

"See other precautions on the back/side panel."

The letter also contained the following:

"EPA Reg. No. 7754-18" is being reserved for this product. This must appear on the finished label. The "Notice of Registration" will be issued when five copies of the acceptable finished (printed) labeling are submitted. Finished labeling is that which will be attached to or accompany the product. . . .

. . .

This letter does not constitute registration and the product may not be lawfully marketed in interstate commerce until it is registered.

The stipulation further includes the following pertinent facts: the respondent has no records to indicate whether the five copies of the labels were sent and EPA has no record of receiving said labels; the respondent manufactured the product in question and shipped a quantity thereof from Buffalo, New York to Griffin, Georgia, on or about February 2, 1973; EPA contends that the product was shipped but not sold or marketed; the product as shipped bore a label[3/] that contained the revisions specified in the above mentioned letter of September 8, 1972; on April 30, 1975, a sample of the product in question which bore the label of the product as shipped, was

3/ Paragraph 7c of the stipulation incorporates this label.

properly collected by an EPA investigator from respondent in Griffin, Georgia; on May 15, 1975 the product in question was registered by EPA.

Although the stipulation does not so state, a comparison of the approved label[4/] with the label that was on the product that was shipped shows that they were identical with the exception that the approved label contained the registration number of the respondent's establishment.[5/]

After the stipulation was signed by counsel for complainant, counsel for respondent added at the bottom of the last page, after the signatures, the following paragraph and added his initials:

> At no time relevant to these proceedings was there publication in the Federal Register notice of denial of registration of said Black Widow Spider Spray nor the reasons for such denial.

Counsel for complainant, while expressing disapproval of such addition being made after she had signed the stipulation decided not to withdraw from the stipulation, stating that the additional paragraph is irrelevant to the case.

Discussion and Conclusions

Prior to September 8, 1972, the respondent had taken steps to register the product and had submitted proposed labeling. The letter of September 8, 1972, from the Registration Division to the respondent

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4/ Paragraph 7b of the stipulation incorporates this label.

5/ A requirement under the 1972 amendments of FIFRA, 7 U.S.C. 136(q)(1)(D).

stated that the product would be acceptable for registration provided certain revisions were made to the labeling. The letter also stated that Notice of Registration would be issued when five copies of acceptable finished labeling are submitted. It was further stated that the letter did not constitute registration.

On the basis of the stipulation I conclude that the respondent did not submit five copies of an acceptable finished labeling until shortly before May 15, 1975. However, after the respondent received the letter of September 8, 1972, it did revise the labeling to comply with the revisions set forth in said letter. It is apparent that after a sample of the product was collected on April 30, 1975, the respondent promptly took steps to complete the registration process and the registration of the product was approved on May 15, 1975.

As above noted, it was specifically stated in the letter of September 8, 1972 "This letter does not constitute registration and the product may not be lawfully marketed in interstate commerce until it is registered." The product was not registered at the time it was shipped. The respondent violated the cited sections of the statute and a penalty is imposable.

The respondent argues that the Agency did not comply with section 4(c) of FIFRA as in effect prior to the 1972 amendments to the Act, 7 U.S.C. 135b(c) or with section 3(c)(6) of the Act, as amended in 1972, 7 U.S.C. 136a(c)(6). Both of these sections provide, in substance, that if an application for registration has been filed and the Agency determines that the requirements for registration

have not been met[6/] it shall notify the applicant of the determination and the reasons therefor and afford the applicant an opportunity to make corrections. If the corrections are not made, the Agency may refuse to register the product in which case the applicant shall be so notified with the reasons therefor. Section (3)(c)(6) of FIFRA, as amended, 7 U.S.C. 136a(c)(6), also provides that whenever the Agency refuses to register a pesticide it shall so notify the applicant and give reasons and promptly publish in the Federal Register a notice of denial of registration and reasons therefor.

Neither of these sections is available to the respondent to negate the violation. The respondent was specifically notified in the letter of September 8, 1972 wherein the labeling of the product did not meet the registration requirements. At no time did the Agency refuse to register the product and it would have been inappropriate to notify the respondent that registration had been refused or to publish notice of denial in the Federal Register.

Having determined that there was a violation and that a civil penalty is imposable we reach the question as to the amount of the penalty.

In determining the amount of penalty that should be imposed, section 14(a)(3) of FIFRA, as amended, 7 U.S.C. 136 l(a)(3), sets forth the following factors that shall be considered: size of respondent's business; effect on respondent's ability to continue in

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6/ E.g., proposed claims not warranted, labeling does not comply with provisions of the Act, etc.

business; and gravity of the violation.

The amount of the proposed penalty set forth in the complaint was derived from the Guidelines for Assessment of Civil Penalties under section 14(a) of FIFRA, 39 FR 27711, July 31, 1974. The respondent makes no claim that the assessment of a civil penalty will effect its ability to continue in business. The amount of the penalty hereinafter assessed is not inappropriate even for a pesticide distributor of the smallest size.

It has generally been accepted by Administrative Law Judges that "gravity of the violation" should be considered from two aspects - gravity of harm and gravity of misconduct.

The gravity of harm in this case was zero. The label of the product that was shipped on February 2, 1973 was identical in all material respects to the label that was subsequently approved on May 15, 1975.

Turning now to gravity of respondent's misconduct. The failure of the respondent to obtain registration of the product after it received the letter of September 8, 1972 resulted from an oversight or negligence to submit five copies of the revised labeling as requested. Although the labeling was revised to comply with the Registration Division's request, the required submission was not made.

The complainant quotes from a previous decision of this Administrative Law Judge in a civil penalty case to the effect that shipment of an unregistered pesticide may be considered to be a serious violation.

This is true in some instances. However, there are degrees of "gravity of the violation" for distributing, shipping, etc., an unregistered pesticide. The Guidelines for Assessment of Civil Penalties recognize such degrees - whether the non-registration was with or without knowledge, whether an application was pending, etc. In this case, not only was an application for registration pending, but all steps necessary to complete the registration had been accomplished save submission of the label with the recommended revisions. The revisions had been made when the product was shipped but the revised label had not been submitted. The label was subsequently approved. The gravity of the misconduct was of a low degree.

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

On consideration of the record in this case and having concluded that the gravity of the violation was of a low degree, I am of the view that an appropriate penalty for the violation in question is $200, and I propose that the following order be issued.

Final Order[7/]

Pursuant to section 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 $200 is hereby assessed against respondent, Animal Repellants, Inc., for the violation which has been established on the basis of the complaint issued on March 25, 1976.

Bernard D. Levinson
Administrative Law Judge

February 28, 1977

7/ Unless appeal is taken by the filing of exceptions pursuant to section 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 section 168.40(c).)

CERTIFICATION

I hereby certify that the original and 8 copies of the Initial Decision were received by me from the Administrative Law Judge, that two copies were mailed, regular mail, to the Hearing Clerk, USEPA, Washington, DC, one copy each was mailed, regular mail, to Willaim T. Johnson, Attorney for Respondent, PO Box 205, Griffin, Georgia 30223 and to John Seitz, Pesticides Enforcement Division, USEPA, Washington, DC. I further certify that one copy each was hand delivered to Gerald M. Hansler, Regional Administrator to Susan Levine, Attorney for Complainant, and to the Environmental Programs Division.

Helen Lee
Regional Hearing Clerk

March 4, 1977