

2/11/80

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR

In the Matter of)
J. C. Ehrlich Chemical Co., Inc.) I.F. & R. Docket No. III-171-C
Respondent)

INITIAL DECISION

Preliminary Statement

This is a proceeding under Sec. 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (7 U.S.C. 136 1(a)), 1973 Supp., for the assessment of a civil penalty for violation of the Act.

On September 5, 1978, the Director, Enforcement Division, United States Environmental Protection Agency, Region III (Complainant), issued a Complaint together with Notice of Opportunity for Hearing, charging J. C. Ehrlich Chemical Co., Inc. (Respondent) with violation of the Act.

The Complaint charged Respondent with violation of Sec. 12 of the Act, 7 U.S.C. 136j, by holding for sale on or about August 5, 1977, in Reading, Pennsylvania, certain pesticides, which pesticide labels were not in compliance with the provisions of FIFRA as follows:

Count I

"On the August 5, 1977, an Environmental Protection Agency (EPA) Consumer Safety Officer obtained a sample of the product "Magic Circle Mill Insecticide with DDVP" (I.D. No. 139509) (EPA Reg. No. 4704-13) during an Establishment Inspection at Respondent's facility located at 800 Hiesters Lane, Reading, Pennsylvania 19605. At that establishment, a sample of the product was collected from stock being held for sale.

The product "Magic Circle Mill Insecticide with DDVP" is a pesticide within the meaning of Section 2(u) of the Act, 7 U.S.C. Sec. 136(u).

Said pesticide was reviewed and found to be in violation of the Act in the following respects:

The sample label differs from the label accepted for registration on June 16, 1975, in that the sample label "Caution" statement was incomplete, (Sec. 2(q)(1)(G)), claims made for the product differ from claims made as a part of the statement of registration, (Sec. 2(n)(1)(A)), use directions also differed from statement of registration (Sec. 2(q)(1)(A)), and the warranty disclaimer negates or detracts from label claims, Sec. 2(q)(1)(A)).....

The action of Respondent in distributing, selling, offering for sale, holding for sale, shipping, or delivering for shipment the product "Magic Circle Insecticide with DDVP" is accordingly in violation of Sections 12(a)(1)(B) and 12(a)(1)(E) of the Act, 7 U.S.C. 136j(a)(1)(B) and 136j(A)(1)(E)."

As will be discussed later Count I is the only allegation which was contested at the hearing in this matter, the total proposed

civil penalty for which is \$5,600.00.

Count II

"On August 5, 1977, an Environmental Protection Agency (EPA) Consumer Safety Officer obtained a sample of the product "Magic Circle Industrial Insecticide" (I.D. NO. 139586) (EPA Reg. No. 4704-5) during an Establishment Inspection at Respondent's facility, located at 800 Hiesters Lane, Reading, Pennsylvania 19605. At that establishment, a sample of the product was collected from stock being held for sale.

The product "Magic Circle Industrial Insecticide" is a pesticide within the meaning of Section 2 (u) of the Act, 7 U.S.C. Sec. 136(u).

The sample label failed to bear the registration number (EPA 4704-PA-01) assigned under Section 7 to each establishment in which it was produced. Thus, the product is misbranded as defined in Section 2(r)(1)(D) of the Act, 7 U.S.C. 136(q)(1)(D).

The action of Respondent in distributing, selling, offering for sale, holding for sale, shipping, or delivering for shipment the product "Magic Circle Industrial Insecticide" is accordingly in violation of Sec. 12(a)(1)(E) of the Act, 7 U.S.C. 136j(a)(1)(E)."

This Count was stipulated by the parties. No civil penalty was proposed.

Count III

"On August 5, 1977, an Environmental Protection Agency (EPA) Consumer Safety Officer obtained a sample of the product "Magic Circle Residual Spray" (I.D. No. 139591) (EPA Reg. No. 4704-22) during an Establishment Inspection at Respondent's facility located at 800 Hiesters Lane, Reading, Pennsylvania 19605. At that establishment, a sample of the product was collected from stock being held for sale.

The product "Magic Circle Residual Spray" is a pesticide within the meaning of Section 2(u) of the Act, 7 U.S.C. Sec. 136(u).

Said pesticide was reviewed and found to be in violation of the Act in the following respects:

a. On or about July 30, 1974, Respondent was notified by EPA of a correction to be incorporated into the product's label. The required change was not found on the label accompanying the sample product held for sale. Thus, the sample label is false and misleading and is misbranded as defined in Section 2(q)(1)(A) of the Act, 7 U.S.C. 136(q)(1)(A).

b. The sample label is false and misleading in that it states that the product was "Manufactured by J. C. Ehrlich" when in fact the product was "manufactured for J. C. Ehrlich." Thus, the product is misbranded as defined in Section 2(q)(1)(A) of the Act, 7 U.S.C. Sec. 136(q)(1)(A).

The action of Respondent in distributing, selling, offering for sale, holding for sale, shipping or delivering for shipment the product "Magic Circle Residual Spray" is accordingly in violation of Section 12(a)(1)(E) of the Act, 7 U.S.C. Sec. 136j(a)(1)(E)."

This Count was stipulated by the parties. No civil penalty was proposed.

Count IV

"On August 5, 1977, an Environmental Protection Agency (EPA) Consumer Safety Officer obtained a sample of the product "Magic Circle Warfarin Rat and Mouse Killer" (I.D. No. 139587) (EPA Reg. No. 4704-10) during an Establishment Inspection at Respondent's facility located at 800 Wiesters Lane, Reading, Pennsylvania 19605. At that establishment, a sample of the product was collected from stock being held for sale.

The product "Magic Circle Warfarin Rat and Mouse Killer" is a pesticide within the meaning of Section 2(u) of the Act, 7 U.S.C. 136(u).

Said pesticide was reviewed and found to be in violation of the Act as follows:

a. The sample label bearing EPA Reg. No. 4704-10 is false and misleading in that it has directions for use of "4 oz. to 1 pound" whereas, the label accepted by EPA pursuant to Section 3 of the Act, bearing EPA Reg. No. 4704-10, has directions for use of "2 oz. to 1 pound". Therefore, the product label is misbranded as defined in Section 2(q)(1)(A) of the Act, 7 U.S.C. Sec. 136(q)(1)(A).

b. The product label stated in part:

Rats: Effective use of Magic Circle Rat and Mouse Killer depends upon providing sufficient bait from successive feedings for five or more days.

However, during a ten-day feeding study involving twenty albino rats, the test animals consumed by choice only 24.5% of the bait resulting in a 100% mortality. An acceptance rate of 33% and 100% mortality rate are necessary to consider the product effective in the commensal rodent environment. Therefore, the product is misbranded as defined in Section 2(q)(1)(A) of the Act, 7 U.S.C. 136(q)(1)(A).

The action of Respondent in distributing, selling, offering for sale, holding for sale, shipping or delivering for shipment the product "Magic Circle Warfarin Rat and Mouse Killer" is accordingly in violation of Sec. 12(a)(1)(E) of the Act, 7 U.S.C. 136j(a)(1)(e)."

Subparagraph a. of Count IV was withdrawn due to error in records of Complainant. All other paragraphs of Count IV were subsequently withdrawn and will be discussed later. A civil penalty of \$2,800.00 was proposed.

Proposed Civil Penalty

In view of the above violations and pursuant to Section 14(a) of the Act, 7 U.S.C. 136 1(a) and the Guidelines for Assessment of Civil Penalties, 39 FR 27711, 27712 (July 31, 1974), the U. S. Environmental Protection Agency proposes to assess a civil penalty of Eight thousand four hundred dollars (\$8,400) against Respondent as follows:

<u>Count I</u>	
Violation of Section 12(a)(1)(B)	\$ 2800.00
Violation of Section 12(a)(1)(E)	2800.00
<u>Count II</u>	
Violation of Section 12(a)(1)(E)	00.00
<u>Count III</u>	
Violation of Section 12(a)(1)(E)	00.00
<u>Count IV</u>	
Violation of Section 12(a)(1)(E)	2800.00
	\$ 8400.00

It should be noted that neither the Administrative Law Judge nor the Regional Administrator is bound by the amount of proposed penalty in the Complaint. See 40 CFR 168.46(b) and 168.60(b)(3).

Respondent, through its Vice-President, filed an answer requesting a hearing and alleging that by any standard, even if these minor violations are as alleged, the amount of the proposed civil penalty is out of line.

The proceedings were conducted pursuant to the applicable Rules of Practice, 40 CFR 168.01 et seq. At my request, the parties, pursuant to Section 168.36(e) of the Rules, corresponded with me for the purpose of accomplishing some of the purposes of a prehearing conference (see Sec. 168.36(a) of the Rules).

A prehearing conference was held in Philadelphia, Pennsylvania, on April 25, 1979, at which certain stipulations were agreed upon by the parties as follows:

1. The products were obtained by Complainant in accordance with law by an authorized employee thereof. EPA Exhibits 1 and 2.
2. The proposed civil penalty was computed in accordance with the EPA Guidelines. And further, that the Respondent is in Category V, with annual gross sales of over \$1,000,000.00. Payment of the penalty will not affect its ability to remain in business.^{1/}

The Complainant was represented by Joseph J. C. Donovan, Esq., and Respondent was represented by its Vice-President, Victor H. Hammel.

Respondent filed a brief in support of proposed findings of fact and conclusions of law, which I have carefully considered.^{2/}

^{1/} Respondent contested the category of "adverse effects unknown" alleging that there exists no evidence of any adverse effects.

^{2/} Complainant did not file a brief in support of proposed findings of fact and conclusion of law. It, therefore, must be assumed that Complainant has rested its case with regard to all Counts with the exception of Count IV which was withdrawn during the hearing.

Counts II and III were not contested and no civil penalty was proposed. Therefore, it is not considered necessary to discuss them further.

Count I, with a proposed civil penalty totalling \$5600.00, was contested by Respondent.

Respondent held for sale and sold Magic Circle Mill Insecticide with DDVP in 5, 30 and 50 gallon sizes all of which had affixed thereto an acceptable registered label. Respondent also had 33 cans of the same product on a shelf in the warehouse which were all one-gallon sizes with a total retail value of \$160.00. The label affixed to these one-gallon sizes had been for many years a registered EPA label. Tr. p. 75. None of these one-gallon sizes had ever been sold without a current registered label.

This size was a very slow mover and none had been packed since 1974. Tr. p. 71. The fact that the one-gallon size did not have a properly registered label was an inadvertent oversight. Tr. p. 74. This was evidenced by the fact that several days after the inspection took place, Mr. Kaczor, Plant Manager, received a telephone call from the Safety Officer advising him of the omission and within one-half hour the one-gallon size labels had been replaced with the correct labels. For the foregoing reason, Count I is hereby dismissed.

Count IV was withdrawn during the hearing after Complainant had placed his case in evidence which consisted solely of documentary

evidence which set forth conclusions concerning the efficaciousness of Respondent's rat and mouse killer. Respondent did not object to the admission of these documents into evidence. Appearing pro se may have affected these admissions. EPA-4-7. There was no opportunity afforded Respondent to cross-examine witnesses concerning these documents or the conclusions reached therein.

Respondent was nevertheless afforded an opportunity to make a statement in lieu of cross-examination of witnesses. Examination of counsel for Complainant was also permitted.

Since Respondent appeared pro se and was prepared to cross-examine Complainant's witnesses concerning factors which it considered to be procedural errors in the conduct of the efficacy tests for its product Magic Circle Warfarin Rat and Mouse Killer, and made a statement which emphasizes these purported errors, none of which were disputed by Complainant, it would be patently unfair to permit Complainant to simply withdraw Count IV without some consideration by the Court. Therefore, while there are instances involving withdrawal of a complaint where both parties are represented by counsel, and both agree to the withdrawal, there are others which would not permit withdrawal where Respondent appears pro se and, as here, Respondent was not afforded an opportunity to cross examine. It is therefore hereby ordered that the withdrawal of Count IV is with prejudice.

Findings of Fact

1. Respondent is a Pennsylvania corporation with its place of business located at 800 Hiesters Lane, Reading, Pennsylvania 19604. Its gross sales exceed \$1,000,000.00 annually and the assessment of the proposed penalty will not effect its ability to continue in business.

2. On or about August 5, 1977, Respondent held for sale or distribution at its establishment in Reading, Pennsylvania the pesticides, "Magic Circle Mill Insecticide with DDVP", "Magic Circle Industrial Insecticide", "Magic Circle Residual Spray", and "Magic Circle Warfarin Rat and Mouse Killer".

3. Samples of these products were obtained from Respondent by a duly authorized Safety Officer of Complainant.

4. Respondent held for sale 1, 5, 30 and 50 gallon sizes of Magic Circle Mill Insecticide with DDVP. The 5, 30 and 50 gallon sizes had affixed thereto an acceptable, registered label.

5. Only the label affixed to the one gallon size was not acceptable. Only 33 one gallon sizes were on hand, with a total retail value of \$160.00.

6. Failure to have the acceptable label affixed to the one gallon size was an oversight which was corrected within one-half hour after being called to Respondent's attention two days after the official inspection disclosed the fact.

7. The EPA establishment number was not printed on the label of Magic Circle Industrial Insecticide.

8. The statement "Manufactured by J. C. Ehrlich" appeared on the label affixed to Magic Circle Residual Spray instead of "Manufactured for J. C. Ehrlich".

Conclusions

I have taken into account all of the factors that are required to be considered in determining the appropriateness of a civil penalty.

I am of the view that a civil penalty in this matter is inappropriate.

The proposed Findings of Fact and Conclusions which were submitted have been considered. To the extent that they are consistent with Findings of Fact, and Discussion and Conclusions herein, they are granted, otherwise they are denied.

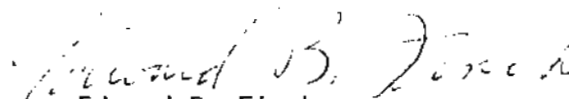
It is also concluded that the withdrawal of Count IV, for the reasons stated herein, is with prejudice.

Having considered the entire record and based on the Findings of Fact, and Discussion and Conclusions herein, it is proposed that the following order be issued.

FINAL ORDER

The Complaint issued on September 5, 1978 against Respondent named herein is dismissed.

February 11, 1980


Edward B. Finch
Administrative Law Judge

Unless appeal is taken by the filing of exceptions pursuant to Sec. 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 Sec. 168.46(c)).