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EPA-REGION X

U.S. ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE REGIONAL ADMINISTRATOR

REGION X

|                           |   |                         |
|---------------------------|---|-------------------------|
| In Re                     | ) |                         |
|                           | ) | IF & R DOCKET NO. X-17C |
|                           | ) |                         |
| Associated Chemists, Inc. | ) | Initial Decision        |
|                           | ) |                         |
| Respondent.               | ) |                         |
|                           | ) |                         |
|                           | ) |                         |

Preliminary Statement

By Complaint dated January 3, 1975, the Director of the Enforcement Division, Environmental Protection Agency, Region X, alleged that Associated Chemists, Inc., hereinafter called Associated, had violated the Federal Insecticide, Fungicide and Rodenticide Act, as amended [86 Stat. 973; 7 USC 136 et. seq.], hereinafter called FIFRA. Specifically, it was alleged that Associated held for sale the product Quill-Cleaner-Disinfectant-Deodorizer-Fungicide, hereinafter called Quill, which was misbranded and adulterated, and a civil penalty of \$2,800 was proposed to be assessed.

On July 15, 1975, an adjudicatory hearing was conducted in Portland, Oregon, at which Respondent was represented by Thomas Guilbert of Davies, Briggs, Strayer, Stoel and Boley of Portland, Oregon, and Complainant by John Y. Hohn of Seattle, Washington.

Findings of Fact

1. Pursuant to a prior written communication, Kendall N. Covert, Consumer Safety Officer in EPA, Region X, visited the establishment of Associated, Portland, Oregon, on March 26, 1974, for the purpose of conducting an establishment inspection and sample collection pursuant to Section 9(a) of FIFRA [7 USC 136g(a)].
2. Mr. Covert conferred with Mr. Nass, Vice President and Manager of Associated, about the firm's registered pesticide products to determine if there was any present desire on the part of Associated to change the registered status of any of these products (TR. 15, line 15). During this conversation Mr. Nass made no indication of intent to change the active registered status of the product Quill (TR. 15, line 25).
3. At Mr. Covert's request, Mr. Nass took Mr. Covert into the warehouse area of the facility so that Mr. Covert could draw physical samples and inspect all products packaged, labeled and readied for shipment. Before entering the warehouse area Mr. Covert handed a Notice of Inspection form to Mr. Nass at the same time repeating that the reason for the inspection (as written on the Form) was to obtain "...samples of any pesticides or devices, packaged, labeled, and released for shipment, and samples of any containers or labeling for such pesticides or devices." (Exhibit No. 1)

4. In the warehouse area approximately 26 feet from the order desk, four cardboard shipping boxes were pointed out to Mr. Covert as containing Quill (TR. 18, line 9).
5. Under Mr. Covert's observation, either Mr. Nass or his assistant removed two one-gallon bottles (jugs) from the shipping containers (TR. 17, line 23). One of these bottles was labeled by the assistant and placed with other samples gathered for Mr. Covert into a box. The other jug of Quill was retained as a duplicate sample by Mr. Nass. Mr. Covert prepared a Receipt for Samples form, which covered six items, including Quill, and which included the following handwritten statement:

"The undersigned acknowledges that the following samples were obtained from pesticides that were packaged, labeled, and released for shipment; or having been shipped are being held for distribution or sale;"

Mr. Nass signed this receipt (Exhibit No. 2).

6. Mr. Covert forwarded the sealed container of Quill to the EPA laboratory in San Francisco where it was tested for chemical content. The product Quill, as tested, was found to contain 0.038 mm/gm total quaternary ammonium salts (Exhibit No. 3). The label that was attached to the product (Exhibit No. 4) claimed a content of alkyl (60% C14, 30% C16, 5% C12, 5% C18) dimethyl benzyl ammonium chlorides 1.6% and alkyl (68% C12,

32% C14) dimethyl ethylbenzyl ammonium chlorides 1.6% which is the same as 0.085 mm/gm when calculated as total quaternary ammonium salts. Therefore, the product was 55% deficient in total quaternary ammonium salts. (Exhibit No.3).

7. A product that is lacking quaternary ammonium salts is less effective as a disinfectant and fungicide (Guilbert, April 3 letter). In some applications an ineffective disinfectant-fungicide may fail to kill organisms which contribute to disease (Guilbert, April 3 letter). The approved label claims effectiveness against staphylococcus aureus, a "very discomforting" disease (TR. 23, line 15).
8. Associated had gross sales in excess of \$1,000,000 during the calendar year 1974 (Exhibit No. 5).

#### DISCUSSION AND CONCLUSIONS

The defense of Associated in essence is that the product Quill was not being held for sale at the time Mr. Covert acquired the sample on March 26, 1974.

Associated and Mr. Nass, its Vice President, stated that the sample of Quill obtained by EPA was one gallon of a single, and only, 55 gallon drum of Quill manufactured by the Company. At the time of manufacture the Quill was poured into 24 one-gallon plastic jugs which were placed into shipping boxes (4) without labels as is the Company's practice with all their products. The remainder of the Quill was stored in a drum.

The four shipping boxes containing Quill were placed in an area near an area occasionally used by Associated to store products held for rework. An employee scotch-taped a handwritten note on the top shipping container which indicated that the contents were not for sale. At the time of Mr. Covert's inspection the note was not visible.

Unfortunately, the action taken by Associated did not prevent Mr. Nass from being of the opinion that Quill was being held for sale on the 26th of March, 1974 (TR. 47, line 3). Mr. Nass knew the purpose for Mr. Covert's sample gathering inspection and delivered the gallon of Quill while under the opinion that it was at that time being held for sale. This opinion must have been implicitly shared by Ms. Cole, Associated's order clerk and only other witness, who might have been the individual who helped Mr. Nass deliver the Quill to Mr. Covert. It is therefore concluded that Respondent did hold for sale Quill and the Quill was adulterated as alleged.

The Penalty: Complainant has computed the proposed assessments by use of the Civil Penalty Assessment Schedule designed to produce comparability of penalties (39 F.R. 27711, July 31, 1974).

Complainant proposed to assess a single penalty against Associated in the amount of \$2,800. Under the heading "Analytical Test Results Formulation Violations", Section 1. Chemical Deficiencies, D.

Inefficacious, for a Category V, as is Respondent, the penalty of \$2,800 is prescribed where the product is partially inefficacious. This is a proper application of the assessment schedule. However, in view of mitigating circumstances here present, this figure should be lowered by 30 percent to \$1,960, which amount is within the negotiating margin approved by the Schedule for settlement purposes. The violation is clearly the result of inexcusable carelessness rather than an intent to market a product substantially deficient in active ingredient.

ULTIMATE CONCLUSION

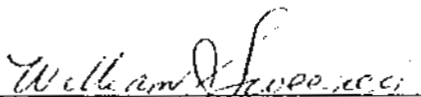
It is found that Respondent violated the provisions of FIFRA as charged and that a civil penalty of \$1,960 should be assessed against it.

ORDER

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended [86 Stat. 973; 7 USC 136 1(a)], a civil penalty of \$1,960 is hereby assessed against Associated Chemists, Inc.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days of the service of the final order upon Respondent by forwarding to the Regional Hearing Clerk a cashier's check or certified check payable to the United States of America in such amount.

- Dated: September 2, 1975

  
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William J. Sweeney  
Administrative Law Judge

CERTIFICATE OF SERVICE

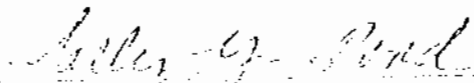
I hereby certify that copies of the foregoing Initial Decision in the matter of EPA v. Associated Chemists, Inc., addressed to the following, were mailed, postage prepaid, at Seattle, Washington, on the 4th day of September 1975:

Thomas Gilbert, Esq. (1 copy)  
Davies, Biggs, Strayer, Stoel and Boley  
Law Offices  
Twenty-Third Floor  
900 SW Fifth Avenue  
Portland, Oregon 97204

Hearing Clerk (2 copies)  
U.S. Environmental Protection Agency  
Washington, D.C. 20460

Copies have also been hand-delivered to the Regional Administrator, EPA, Region X, and to Mr. John Hohn, Legal Support Branch, EPA, Region X.

Dated this 4th day of September 1975.

  
Sally Y. Bond  
Region X Hearing Clerk