UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION VII
324 EAST ELEVENTH STREET
KANSAS CITY, MISSOURI 64106

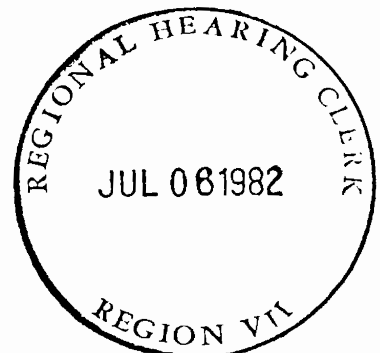
IN THE MATTER OF:	)	I.F. & R. Docket No. VII-428C-82P
Aero-Master, Inc. 325 West Pacific Avenue St. Louis, Missouri	)	Marvin E. Jones Administrative Law Judge
Respondent	)	

INITIAL DECISION

By Complaint filed November 27, 1981, Respondent is charged in two Counts with violation of Section 12 of Federal Insecticide, Fungicide and Rodenticide Act ("the Act"). On March 11, 1982, Complainant was granted leave to, and did, withdraw Count I of said Complaint. Count II alleges that one gallon of a pesticide, identified as E.P.A. Sample 9012179, and found to contain amounts of MGK-264, piperonyl butoxide and pyrethrins, and referred to herein as Aero-Master Fogging Compound, was, on or about June 4, 1980, shipped in a Model A Aero-Master Fogging Machine, from St. Louis, Missouri, to Mr. Gatti's Pizza, Brooklyn Park, Minnesota; and that said pesticide was misbranded in that it failed to bear:

1. the registration number assigned under Section 7 to the establishment in which it was produced;

2. warning or caution statements which are necessary and, if complied with, adequate to protect health and the environment;



3. the warning or caution statement "Keep Out of Reach of Children", together with a signal word such as "Caution"; and

4. an ingredient statement giving the names and percentages of each active ingredient, together with the total percentage of the inert ingredients.

Section 12(a)(1)(E) (7 U.S.C. §136j(a)(1)(E)) of the Act provides:

> "Sec. 12. UNLAWFUL ACTS.
>
> "(a) In General. -
>
> "(1) ...it shall be unlawful for any person in any state to (sic) sell, offer for sale...ship, deliver for shipment...to any person -
>
> "(E) any pesticide which is...misbranded;"

Section 2(p) (7 U.S.C. §136(p)) defines label as follows:

> "(1) Label. - The term 'label'means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers."

The regulation, in pertinent part, governing label requirements states at 40 CFR 162.10(a)(4):

> "(4) Placement of Label -
>
> "(i) General. The label shall appear on or be securely attached to the immediate container of the pesticide product. For purposes of this Section, and the misbranding provisions of the Act, 'securely attached' shall mean that a label can reasonably be expected to remain affixed during the foreseeable conditions and period of use..."

Section 2(q), (7 U.S.C. §136(q)) defines "misbranded" as follows:

"(q) Misbranded. -

"(1) A pesticide is misbranded if -

"(D) its label does not bear the registration number assigned under section 7 to each establishment in which it was produced; ...

* * *

"(G) the label does not contain a warning or caution statement which may be necessary and if complied with, together with any requirements imposed under section 3(d) of this Act, is adequate to protect health and the environment; ...

"(2) A pesticide is misbranded if -

"(A) the label does not bear an ingredient statement on that part of the immediate container (and on the outside container or wrapper of the retail package, if there be one, through which the ingredient statement on the immediate container cannot be clearly read) which is presented or displayed under customary conditions of purchase, except that a pesticide is not misbranded under this subparagraph if:

"(i) the size of (or) form of the immediate container, or the outside container or wrapper of the retail package, makes it impracticable to place the ingredient statement on the part which is presented or displayed under customary conditions of purchase: and

"(ii) the ingredient statement appears prominently on another part of the immediate container, or outside container or wrapper permitted by the Administrator; ...

"(C) there is not affixed to its container, and to the outside container or wrapper of the retail package, if there be one ..., a label bearing -

"(i) the name and address of the... registrant...;

"(ii) the name...under which the pesticide is sold;

"(iii) the net weight...of the content; ...

"(iv) ...the registration number assigned to the pesticide under this Act, ..."

An evidentiary hearing was held in Courtroom 313, U.S. Court House, 1114 Market Street, St. Louis, Missouri, on Wednesday, May 5, 1982. Prior to hearing, the parties agreed (T.7) to the following stipulations read into the record:

1. on or about June 4, 1980, Respondent shipped a Model A Aero-Master fogging machine from St. Louis, Missouri, to Mr. Gatti's Pizza, Brooklyn Park, Minnesota;

2. at the time of said shipment, said fogging machine contained one gallon Aero-Master fogging compound, a pesticide;

3. said fogging machine and pesticide was received by Mr. Gatti's on June 6, 1980, and returned to Respondent on July 14, 1980;

4. the documents identified as Exhibit A to Respondent's answer, which includes labeling materials as follows: A sufficient ingredient statement, a registration number, a cautionary statement.

The above should be received in evidence.

Complainant does not stipulate that such materials accompanied the subject shipment or that such materials were properly attached to the said fogging machine.

5. the salient issue in this case is (a) were the materials in Paragraph (4) above packed with the fogging machine at the time of shipment; and (b) were said materials properly attached to the fogging machine containing the pesticide;

6. Complainant stipulates that it has no record of previous violations by Respondent;

7. gross sales of Respondent place it in Category 4 ($700,000 to $1,000,000 per annum) for purposes of determining the size of that business.

Having fully considered the proposed findings of fact, conclusions of law, briefs and arguments filed by the parties, along with the evidence of record, I make the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. On or about June 4, 1980, Respondent shipped from St. Louis, Missouri to Brooklyn Park, Minnesota, a Model A Aero-Master Fogging Machine.

2. Said Fogging Machine contained approximately one gallon of Aero-Master Fogging Compound (a liquid) which is a pesticide as hereinabove stipulated.

3. Certain labeling materials, i.e., the "label" (Respondent's Exhibit A), containing (a) a sufficient ingredients statement; (b) the appropriate registration number; and (c) cautionary statements and ingredient statements, sufficient to satisfy, as to content, the requirements of said Section 2(q), accompanied the said shipment, supra.

4. The said label was not affixed to the said fogger in a manner that it could reasonably be expected to remain affixed during a foreseeable period of use, but, rather, said "label" was contained in a cellophane packet which was tied to the handle of said Aero-Master Fogging Machine (T.20).

5. The "fogging machine" is not a disposable item but is intended to be used over and over, for various purposes, for an extended period of time (T.22); whereas, the plastic gallon bottle, now used for shipment of said pesticide, and bearing the subject label as required by the Act (T.26), is a "disposable container" (T.26, line 24; T.27, line 3).

6. The current method of shipment (Exhibit I), used by Respondent, packs the Fogging Machine and a one-gallon plastic bottle of subject pesticide as separate entities (T.23, line 25), and the pesticide label is wrapped around and securely attached to the plastic bottle containing the pesticide (T.25).

CONCLUSIONS OF LAW

1. Shipment by Respondent of subject pesticide, then contained in said Aero-Master Fogging Machine on which immediate container the prescribed label was not securely attached, is a violation of Section 12 of the Act.

2. The current method of shipment of subject pesticide used by Respondent, where said pesticide is contained in a one-gallon plastic bottle, with appropriate prescribed label securely attached thereto, complies with the requirements of the Act.

3. The requirement that the prescribed pesticide label be securely attached to the immediate container used for shipment of said pesticide is regulatory in nature, i.e., the registration was approved for the said pesticide with the requirement and expectation that the label approved would be applied and displayed strictly in accordance with the applicable law and regulations so that maximum protection for the public health and environment would be assured.

CIVIL PENALTY

Section 14 of the Act (7 U.S.C. 1361) provides as follows:

"Sec. 14. PENALTIES.

"(a) Civil Penalties. -

"(1) In General. - Any registrant...retailer, or other distributor who violates any provision of this Act may be assessed a civil penalty... of not more than $5,000 for each offense." ...

* * *

"(4) Determination of Penalty. - In determining the amount of the penalty, the Administrator shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation. Whenever the Administrator finds that the violation occurred despite the exercise of due care or did not cause significant harm to health or the environment, the Administrator may issue a warning in lieu of assessing a penalty."

The penalty proposed by the Complainant was derived in accordance with Guidelines for the Assessment of Civil Penalties (39 FR 27711 et seq). In its Prehearing Exchange, page 2 (dated January 25, 1982), Complainant conceded that Respondent's tax return established its gross income for 1980 at an amount under $1,000,000; and since Count I of the Complaint was by it withdrawn, proposed that the penalty appropriately to be assessed for the violation charged by Count II should be $4,420, the amount provided in the assessment matrix for Category IV Respondents.

The regulation respecting the amount of the civil penalty (40 CFR 22.27, "Initial decision"), provides as follows:

> "(b) Amount of civil penalty. If the Presiding Officer determines that a violation has occurred, the Presiding Officer shall determine the dollar amount of the recommended civil penalty to be assessed in the initial decision in accordance with any criteria set forth in the Act relating to the proper amount of a civil penalty, and must consider any civil penalty guidelines issued under the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty recommended to be assessed in the complaint, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. The Presiding Officer shall not raise a penalty from that recommended to be assessed in the complaint if the respondent has defaulted."

Section 22.35(c) provides:

> "(c) Evaluation of proposed civil penalty. In determining the dollar amount of the recommended civil penalty assessed in the initial decision, the Presiding Officer shall consider, in addition to the criteria listed in

> section 14(a)(3)* of the Act, (1) respondent's history of compliance with the Act, or its predecessor statute and (2) any evidence of good faith or lack thereof. The Presiding Officer must also consider the guidelines for the Assessment of Civil Penalties published in the FEDERAL REGISTER (39 FR 27711), and any amendments or supplements thereto."

The civil penalty guidelines provide the amount of the civil penalty, here proposed, by consideration of the offense charged and the size of Respondent's business. I find no evidence that Respondent's ability to continue in business will be affected should the proposed amount be assessed. The Act further provides that the gravity of the violation be considered. Gravity of the violation should be determined by consideration of both the possible peril that might arise as a result of the violation, and the seriousness of the misconduct of the violator necessarily attendant. Whereas, intent to violate is not a factor to be determined in establishing the violation charged, lack of intent can be considered as a mitigating factor in determining gravity of violation from the standpoint of the misconduct of the violator.

In the instant case, the shipment was made to demonstrate Respondent's Fogging Machine. It appears that it was advantageous, from the standpoint of selling said machine, if, when the machine was unpacked, the pesticide was already in the machine, so that the prospective buyer was not required to open the pesticide container and empty its contents into the Fogging Machine prior to use. Respondent's effort to achieve this advantage and at the same time to supply the information required by the Act was to "tie" a cellophane packet containing information, including cautionary language,

* The subsection referred to is subsection (4).

to the handle of the machine. In recognition that the former method of shipment did not comply with, but allegedly violated, the Act, Respondent currently securely attaches the label to a one-gallon plastic bottle containing the pesticide which is shipped in the same carton with the Fogging Machine but as a "separate entity." (T.23)

Respondent contends that the former method of shipment was "substantial compliance" with the Act. I do not agree. The former method of shipment was "attempted compliance" - but its use was motivated, in the main, to facilitate easier demonstration and sale of his product.

The omission here considered is a regulatory offense which violates a statute which is remedial in nature. Strict compliance with 40 CFR 162.10(4), promulgated pursuant to the Act, is required to provide adequate protection to the public (Belsinger v. D.C., 295 FS 159, affd. 436 F2d 214; Tcherepen v. Knight, 389 US 332, 88 S.Ct. 548 (1967))

It is unquestioned that subject label requirements, governing the handling and use of the pesticide, are essential to adequately protect the public. The public is comprised of persons who come into contact with the pesticide as well as those responsible for its handling and use.

The desirability and purpose of securely attaching the label to the pesticide container should also be apparent. From a purely objective viewpoint, there is a crucial time during the period of use when the label should or might be consulted. "Directions" and "Warnings" should be immediately apparent and available if adequate protection of the public is to be effectuated. Any possibility that the user will be required to "seek

out" the label directions increases the probability that the directions will not be adequately followed or heeded.

Minor variations from the prescribed procedures might seem trivial where but one instance is considered. However, such variations, contrived to fit the convenience or the whims of each particular distributor or user, could be as varied as the circumstances under which such use is permitted.

As was observed in Wickard v. Filburn, 317 US 111, 63 S.Ct. 82:

"(Respondent's) violation, taken together with that of many others, is far from trivial."

Any failure to apply adequate sanctions where the Act is violated will, in effect, invite violations in increasing numbers which could ultimately frustrate, and even defeat, the scheme of regulation contemplated by the Act. (Wickard, supra; Re: I.D. Russell Co. Labs, I.F. & R. Docket No. VII-189C (1976)).

I have also considered that the labeling material accompanying the machine was, on this record, accurate and adequate, if consulted by the user; and that Respondent, in good faith, acted to repackage his shipment to comply with the requirements of the Act when he was advised regarding subject violation. Both are mitigating factors, as is the fact that Respondent has no history of past violations, and have been accorded appropriate weight in determining the amount of the civil penalty to be assessed.

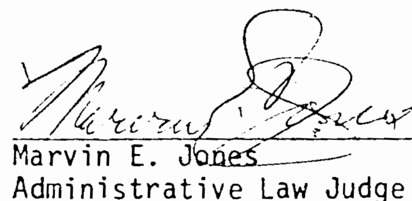
On consideration of the facts in the record and the provisions of the law and regulations pertinent hereto, and for the reasons above set forth, I find that an appropriate civil penalty to be assessed for the violation here found should be, and it is hereby proposed, in the amount of $2,100.

PROPOSED FINAL ORDER 1/

1. Pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended, a civil penalty of $2,100 is hereby assessed against Respondent, Aero-Master, Inc., for the violation of Act found herein.

2. Payment of the full amount of the civil penalty assessed shall be made within sixty (60) days after receipt of the Final Order by forwarding to the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region VII, a cashier's or certified check payable to the Treasurer, United States of America.

DATED: 7/6/87



Marvin E. Jones
Administrative Law Judge

1/ 40 CFR 22.27(c) provides that this initial decision shall become the final order of the Administrator within forty-five (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.

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 the Initial Decision to the Administrator.

DATED: July 6, 1982

Mary Lou Clifton
Mary Lou Clifton
Secretary to Marvin E. Jones, ALJ