UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of William Myers, d/b/a Gift Sales Company, Respondent	)	Docket No. I. F. & R. VII-475C-83P

Federal Insecticide, Fungicide and Rodenticide Act - Sales of an Unregistered Pesticide - Determination of Penalty - Although understanding with U.S. Attorney at time of dismissal of information charging Respondent with criminal violations of Act for sales of an unregistered pesticide to the effect that there would be no penalty, did not estop Complainant from assessing civil penalty for the same violations, such an understanding along with other factors were appropriate bases for reducing amount of penalty otherwise determinable in accordance with FIFRA penalty guidelines.

Appearance for Respondent:

David M. Bryan
Attorney at Law
Wichita, Kansas

Appearance for Complainant:

Henry F. Rompage, Esq.
Office of Regional Counsel
Environmental Protection Agency
Region VII
Kansas City, Missouri

Initial Decision

This civil penalty proceeding under § 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act, as amended (7 U.S.C. 1361)[1/] was commenced by the issuance of a complaint on January 24, 1983, by the Regional Administrator, U.S. Environmental Protection Agency, Region VII, Kansas City, Missouri. The complaint charged Respondent, William Myers, d/b/a Gift Sales Company, with the sale on March 29, 1981, to Howard's Supermarket, Inc., Wichita, Kansas, of 24 12-ounce of Chem-O-Kill Insecticide For Flying Insects. Labels on cans of the insecticide indicated that active ingredients of the product included "Dichloro-Diphenyl Trichloroethane" (DDT) 3.000%. The complaint noted that on January 15, 1971, registrations of all but a limited number of uses of DDT were canceled and that, although the label clearly made pesticidal claims, the product was not registered. Count II charged Respondent with an earlier sale, on June 22, 1980, of 24 containers of Chem-O-Kill to Howard's Supermarket, Inc. A penalty of $3,520 was proposed to be assessed against Respondent on each count for a total of $7,040.

Respondent, through counsel, filed an answer on February 15, 1983, denying the essential factual allegations of the complaint, alleging prior settlement and resolution of this matter in the United States District Court for the District of Kansas and requesting a hearing.

1/ Section 14(a) of the Act, entitled "Penalties" provides in part:

"(a) Civil Penalties--

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

A hearing on this matter was held in Wichita, Kansas, on October 3, 1983.

Based on the entire record, including the briefs and arguments of the parties, I find that the following facts are established:2/

Findings of Fact

1. Respondent, Mr. William Myers is the owner of and has operated Gift Sales Company, Wichita, Kansas, for approximately 20 years (Tr. 38).

2. On June 22, 1980, Respondent sold 24 12-ounce cans of Chem-O-Kill to Howards Supermarket, Inc., Wichita, Kansas (EPA Exh 5). On March 29, 1981, Respondent sold an additional 24 cans of Chem-O-Kill to Howard's Supermarket, Inc., Wichita, Kansas.

3. Labels on the cans referred to in the preceding finding described "Chem-O-Kill" as an insecticide for flying insects and indicated it was for use on, inter alia, mosquitoes, flies, gnats, ants, fleas, wasps, hornets, roaches, bedbugs, crickets and silverfish (EPA Exh 2). The labels did not contain an EPA registration or establishment number and indicated that the manufacturer was Gift Sales Co., P. O. Box 5082, Wichita, Kansas. Active ingredients listed on the labels included the following:

"Dichloro-Diphenyl Trichloroethane (DDT) 3.000%"

4. On April 9, 1981, Mr. Daniel Tuggle, an employee of the Kansas Department of Agriculture, conducted an inspection of Howard's Supermarket, Wichita, Kansas (Tr. 7). In the course of the inspection, he observed

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2/ Proposed findings not accepted are either rejected or considered unnecessary to the decision.

cans of Chem-O-Kill on the shelves and after checking his records, determined that the product was not registered with the State of Kansas (Tr. 8, 9). He observed that there was no EPA registration number on the label and that the label indicated the presence of DDT. He placed a stop sale order on the cans of Chem-O-Kill, selected at random two cans of Chem-O-Kill, obtained and copied the invoice indicating sale of the product to Howard's, paid for the two cans (marking them with Sample No. 000852, the date and his initials), giving the manager a receipt for samples, and placed the cans in a cooler in the trunk of his car (Tr. 11).

5. The two cans of Chem-O-Kill obtained by Mr. Tuggle from Howard's Supermarket, referred to in the preceding finding, were delivered to Mr. Oliver Bennett, Jr., a chemist employed by the Kansas State Board of Agriculture Laboratories (Tr. 19, 20). Mr. Bennett conducted an analysis on a sample of Chem-O-Kill (No. 000852), determining that the sample contained 3.31% DDT (Tr. 23).

6. Official notice is taken of the fact that by PR Notice 71-1, January 15, 1971, notice of cancellation of the registrations of products containing DDT was given and that after extended hearings, the Administrator on June 2, 1972, issued a final decision canceling the registrations of products containing DDT with limited exceptions not applicable here.3/

7. Mr. Myers testified that he received a telephone call from Mr. Tuggle at Howard's Supermarket informing him that because Chem-O-Kill contained

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3/ Exceptions were for use and distribution by or approval of the U.S. Public Health Service for the control of vector diseases, for use by and distribution to the USDA or military for health quarantine use, for use in the formulation of prescription drugs for controlling body lice and for use in controlling body lice.

DDT, it could not be sold (Tr. 38). Although Mr. Tuggle denied making any such call,4/ an invoice from Gift Sales Company to Howard's Supermarket, dated April 24, 1981, contains the credit notation "less Chem-O-Kill Pickup" (EPA Exh 5).

8. Mr. Marvin Frye, an enforcement or compliance officer for EPA, Region VII, conducted an investigation of Gift Sales Company on March 11, 1982 (Tr. 24, 25). The purpose of the investigation was to obtain records associated with the sale of Chem-O-Kill to Howard's Supermarket. The investigation was conducted pursuant to a warrant issued by a U.S. Magistrate (Tr. 27). In the course of this investigation, an invoice indicating the sale of Chem-O-Kill to Howard's Supermarket on June 22, 1980, was obtained (EPA Exh 5).

9. On July 29, 1982, the U.S. attorney filed an information in U.S. District Court charging Respondent with two misdemeanor counts for violations of FIFRA resulting from the sales referred to above.5/ The information was dismissed on November 5, 1982, because of the court's order suppressing evidence. Examination of the court's memorandum opinion (note 5, supra) reflects that evidence suppressed was 23 aerosol spray cans of Chem-O-Kill insecticide seized at the time of investigation referred to in the preceding finding, based on a determination that an isolated sale of an unregistered pesticide 11 months prior to the issuance of a search warrant did not support a finding of probable cause to believe that aerosol cans of unregistered pesticide are being held for sale on the business premises. The court expressly determined

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4/ Tr. 18, 19. Complainant states that it is likely that Mr. Tuggle's supervisor called Mr. Myers sometime after the inspection (Reply Brief, filed November 23, 1983).

5/ Facts stated are based on the Memorandum and Order issued by the U.S. District Court for the District of Kansas, Criminal No. 82-10058-01, on November 10, 1982, of which official notice is taken.

that an isolated sale of an unregistered pesticide 11 months prior to the issuance of a search warrant would support a finding of probable cause to believe that records kept in the ordinary course of a business are on the business premises.

10. Mr. Vern Miller, an attorney who represented Respondent in the mentioned criminal action, testified that, prior to the dismissal, he had discussed the matter at great length with Mr. Jackie Williams, an Assistant U.S. Attorney handling the case (Tr. 43, 44). Mr. Miller further testified that after the court had granted the suppression motion, it was agreed that the information would be dismissed provided Respondent paid $400, a civil penalty imposed as a result of a prior administrative proceeding. He stated that it was his understanding that if his client paid the $400, the case was absolutely through and that he was told there would be no further penalty. He said that he would not have agreed to the dismissal, if he had known there would be an attempt to impose a further penalty.

11. Upon cross-examination, Mr. Miller acknowledged that the discussion with Mr. Miller did not include subsequent administrative or civil actions (Tr. 45). He testified that he presumed at the time that Mr. Williams would have told him, if there was going to be some other action. He further testified that in response to a specific question as to whether this [dismissal] ended the matter, Mr. Williams replied "this ends it, it [the proceeding] is over with" (Tr. 46). Acknowledging that this was the criminal case, he (Miller) asserted that he felt it also applied to any penalty and that Mr. Williams said "there is no fine, there is no penalty, it is all over" (Id.). Asked if he was aware of the distinction between a penalty and a fine, Mr. Miller replied in the affirmative,

stating that a man charged with a crime can be assessed a penalty and a fine (Tr. 47, 48). He asserted that in this case the government was after a fine and a penalty.6/ He explained that if his client had been found guilty, he (Myers) could have been assessed a penalty and a fine and that he (Miller) did not know they were going to come back and try to fine him again, outside of the action that had already been filed. Mr. Miller stated that was the reason when this [the action] was terminated, he felt there would be no fine or anything else.

12. An affidavit of Mr. Jackie N. Williams, Assistant U.S. Attorney for the District of Kansas, dated September 15, 1983, was admitted into evidence (EPA Exh 6), subject to Respondent's objection, based on counsel's representation that Mr. Williams was unavailable.7/ Counsel for Respondent indicated that he did not dispute the facts stated in the first five paragraphs of the affidavit, which include the statement that the civil penalty Respondent agreed to pay as a condition to dismissal of the information was a civil action by EPA.8/ The sixth and final paragraph of the affidavit is as follows:

> "That at no time during any discussions with Defendant or Defendant's counsel did either party discuss or agree that no further action would be taken in regard to Defendant. The discussion was only of the immediate criminal action and nothing more; that is, the dismissal of the immediate Information was the only topic of discussion. At no time did the Government state, imply or represent that the facts giving rise to the Information would or would not be used in any subsequent civil action."

6/ Tr. 46. See, e.g., Berdick v. United States, 612 F.2d 533 (Ct. Cls 1979) (criminal conviction under False Claims Act sufficient to conclusively establish liability for civil penalties under Act).

7/ Tr. 50. Although not of record, the ALJ recalls that the reason given at the prehearing conference for Mr. Williams being unavailable is that he was out of town.

8/ Mr. Miller testified that Mr. Myers had attempted to pay the $400 penalty, but that his check had been returned because he (Myers) had refused to sign a consent order (Tr. 47).

13. Ms. Judith Sturgess, an employee of EPA, Region VII, Kansas City, Missouri, testified that she was involved in the preparation of the complaint leading to the instant action (Tr. 31, 32). She further testified that from her review of documents submitted by Mr. Tuggle and Mr. Frye and the report of analysis conducted by Mr. Oliver Bennett, she determined that the facts supported two charges for two separate sales of unregistered pesticides. Her review of EPA records indicated that Gift Sales Company had neither registered nor applied for registration of Chem-O-Kill (Tr. 34). The proposed penalty was derived utilizing the guidelines for the assessment of Civil Penalties Under the Federal, Insecticide, Fungicide and Rodenticide Act, as amended (39 FR No. 148, July 31, 1974, at 27711). Because information as to Respondent's gross sales was unavailable, determination of the proposed penalty was made based on gross sales of over $1,000,000, in accordance with the guidelines. The penalty was adjusted upward by ten percent, because of Respondent's history of violations.

14. Mr. Myers testified that he had purchased the Chem-O-Kill involved in this proceeding approximately 25 years ago and that he picked it up from Howard's Supermarket after being informed by Mr. Tuggle (see finding 7) that the product could not be sold (Tr. 38). He stated that after an article concerning this incident appeared in the paper, people called him wishing to purchase the product, but that he refused to sell it (Tr. 40). He further testified that, although he could not remember exactly, gross sales of Gift Sales Company in 1979 and 1980 were "(s)omewhere under $100,000, something like $98,000." Copies of Schedule C (Form 1040), submitted with Respondent's post-hearing brief pursuant to stipulation,

indicate gross sales of Gift Sales Company were $297,534 in 1979 and $371,086 in 1980. Net profit was approximately 5.7 percent of gross sales in 1979 and approximately 3.8 percent of gross sales in 1980.

Conclusions

1. Respondent's action in selling to Howard's Supermarket, Inc. on June 22, 1980 and March 19, 1981, Chem-O-Kill Insecticide, an unregistered pesticide, constituted violations of § 12(a)(1)(A) of the Act (7 U.S.C. 136j(a)(1)(A)).
2. The understanding reached between counsel for Respondent and the Assistant U.S. Attorney at the time the criminal information was dismissed to the effect that there would be no penalty, does not estop Complainant from maintaining the instant action.
3. For the above violations of the Act, Respondent is liable for a civil penalty.

Discussion

The evidence establishes and Respondent has not disputed the sales of Chem-O-Kill Insecticide to Howard's Supermarket on June 22, 1980 and March 29, 1981. Likewise, there is no dispute that the product was unregistered.9/ Accordingly, it is clear that Respondent has violated the Act as charged in the complaint.

In connection with the alleged understanding with the U.S. Attorney at the time the information was dismissed to the effect that the matter was closed and that there would be no further fine or penalty, consideration

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9/ Although the charge presumably could have been violation of a cancellation order pursuant to § 12(a)(k) of the Act, no sound reason appears for disturbing Complainant's choice in the matter.

must be given to the affidavit of Assistant U.S. Attorney, Jackie N. Williams, which was admitted subject to Respondent's objection.

Rule 22.22(d) of the Rules of Practice (40 CFR Part 22) provides for the admission of the affidavits of witnesses who are "unavailable" and that "unavailable" shall have the meaning according to the word by Rule 804(a) of the Federal Rules of Evidence. Rule 804(a) provides that "unavailability as a witness" includes situations where the declarant is absent from the hearing and the proponent of his statement has been unable to procure his attendance by process or other reasonable means. There is no provision authorizing the issuance of subpoenas to compel the attendance of witnesses in civil penalty proceedings under FIFRA and it is clear that there is not any process to compel the attendance of Mr. Williams which could have been issued. The issue is seemingly then reduced to whether counsel demonstrated reasonable efforts to secure Mr. Williams' attendance. It is concluded that this question must be answered in the negative, the mere declaration that a witness is out of town (note 7, supra), being insufficient to make a witness unavailable within the meaning of Federal Evidence Rule 804. See U.S. v. Mann, 590 F.2d 361 (1st Cir. 1978) (even where absent witness was beyond court's jurisdiction, government must show diligent effort to secure voluntary return of witness to testify in order for unavailable rule to apply). See also Perricone v. Kansas City Southern Railway Company, 630 F.2d 317 (5th Cir. 1979) (reversible error to allow reading of testimony of witness given in another case where no satisfactory showing witness was unavailable was made). A fortiori would this rule be applicable to an affidavit. It is concluded that Respondent's objection to the sixth paragraph of Mr. Williams' affidavit (finding 12) was well taken and this paragraph will be disregarded.

Accepting Mr. Miller's testimony concerning his discussion with Assistant U.S. Attorney Williams as accurate, there is room for doubt as to the scope of the understanding reached at the time the criminal proceeding was dismissed. This is because at one point Mr. Miller acknowledged that the discussion did not include subsequent administrative or civil actions (finding 11). His testimony that he presumed Mr. Williams would have told him, if there was going to be some other action is a further indication that he (Miller) may have been reading more into the discussion than was warranted. Moreover, the fact that he would not have agreed to the dismissal, if he had known there would be an attempt to impose a further penalty (finding 10) is not persuasive, because an acquittal of his client in the criminal case10/ would not have precluded the instant proceeding.11/

Notwithstanding the foreging, there is ample evidence to conclude Mr. Miller was assured that after the dismissal there would be no fine and no penalty (findings 10 and 11). The dismissal was conditioned on defendant Myers' agreement to pay $400, a civil penalty assessed in a prior proceeding. Although at one point Mr. Miller indicated that he was of the opinion his client did owe the $400 (Tr. 43), at another point he testified "The $400 I really felt that he [Myers] did not owe" and that "(W)e would not have paid the $400 back without another option" (Tr. 47). He indicated he considered the $400 as a fine. The "other option" apparently included going to trial on the criminal case and defending any attempt by the government to collect the $400. His opinion that Respondent did not owe the $400 was apparently based in part on the fact Mr. Myers' check was returned (note 8,

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10/ Mr. Miller testified that he knew he could beat him [Williams] in his [the criminal case], because he did not have any evidence [after losing the suppression motion] (Tr. 43).

11/ See Murray & Sorenson, Inc. v. U.S., 207 F.2d 119 (1st Cir. 1953) (acquittal in criminal prosecution not a bar to susequent suit for forfeitures and double damages based on same facts).

supra) and in part upon the fact the government waited three or four years to collect. Respondent had refused to sign a consent order (note 8, supra) and thus had not agreed expressly to the penalty. Accordingly, it cannot be said that the agreement to pay the $400 is a circumstance to be disregarded in determining the amount of the penalty.12/

Estoppel can rarely be successfully invoked against the government. It has, however, been held that the government will be estopped by circumstances amounting to affirmative misconduct.13/ Because it may well be questioned whether the U.S. Attorney had the authority to commit Complainant in the matter of a further civil penalty, one of the essential elements for invoking estoppel against the government is lacking and Complainant is not estopped to prosecute the instant proceeding.

Respondent, however, argues that Complainant's institution of this proceeding is a breach of the plea negotiation (letter brief, dated November 15, 1983, at 2). The general rule is that prosecuting officials will be required to strictly adhere to the terms of plea bargains, upon the theory the defendant has thereby been induced to plead guilty. Although Respondent's agreement to pay $400 is hardly comparable to a plea of guilty

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12/ It is not clear whether this sum has actually been paid.

13/ See Home Savings and Loan Association v. Nimmo, 695 F.2d 1251 (10th Cir. 1982) (where at time of foreclosure proceedings under Veteran's Administration guaranteed loan, VA knew, but did not disclose, possibility of forgery of signature on note and mortgage, VA was held estopped to deny validity of loan guaranty); Community Health Services, ETC v. Califano 698 F.2d 615 (3rd Cir. 1983) (where on five separate occasions over two year period agent of Secretary of HHS had incorrectly advised plaintiffs that CETA grants did not have to be offset against reimbursable medicare costs and plaintiffs acted on this advice to their detriment, government was estopped from seeking recoupment); Cf. International Organization of Masters, ETC v. Brown, 698 F.2d 536 (D.C. Cir. 1983) (generally governments may not be estopped absent action that would result in "egregious injustice").

to a criminal charge,14/ there can be little doubt that an agreement to pay or the actual payment of a disputed sum is sufficient consideration to support a contract. As previously noted, the U.S. Attorney's authority to commit Complainant in the matter of further civil penalty proceedings may well be questioned, and the purported agreement or contract may not be binding in the strict legal sense. Nevertheless, it is considered to be a matter appropriately for consideration in determining the amount of the penalty.15/

The record reflects that the amount of the proposed penalty was determined in accordance with the FIFRA Civil Penalty Guidelines (39 FR 27711 et seq. July 31, 1974) by placing Respondent in Category V (gross sales of over $1,000,000) for which the indicated penalty for sale of an unregistered pesticide is $3,200. As indicated (finding 13), this was adjusted upward by ten percent, because of Respondent's history of violations. The evidence, however, reflects that Respondent is in Category II (gross sales of $100,000 to $400,000) for which the indicated penalty for sale of an unregistered pesticide is $800. Doubling this figure for the separate sales without adjustment would result in a total penalty of $1,600. Because of the understanding with the U.S. Attorney referred to previously, because Respondent's net is a small fraction of his gross sales (finding 14) and because these appear to have been isolated sales of a pesticide product purchased by Respondent over 20 years ago, it is determined that an appropriate penalty is $800. The purpose of a penalty is to deter

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14/ It is noted that § 14(a)(5) of the Act (7 U.S.C. 1(a)(5) requires the reference to the Attorney General for collection of cases where the Administrator has been unable to collect all or any part of a civil penalty.

15/ The Civil Penalty Guidelines (39 FR at 27712) provide for mitigation of the penalty including where "special circumstances" exist.

future violations and in this instance a penalty of $800 is adequate for that purpose.

Conclusion

Respondent, William Myers, d/b/a Gift Sales Company, having violated § 12(a)(1)(A) of the Act (7 U.S.C. 136 j(a)(1)(A)) for sales of an unregistered pesticide as charged in the complaint, a penalty of $800 is assessed against Respondent in accordance with § 14(a)(1) of the Act. Payment of the penalty will be accomplished by forwarding a cashiers or certified check in the amount of $800 payable to the Treasurer of the United States to the Regional Hearing Clerk within 60 days of receipt of this order.16/

Dated this 23rd day of December 1983.

Spencer T. Nissen
Administrative Law Judge

16/ Unless appealed in accordance with 40 CFR 22.30 or unless the Administrator elects, sua sponte, to review the same as therein provided, this decision will become the final order of the Administrator as provided in 40 CFR 22.27(c).